83-6350

No. 83-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

TIMOTHY WESLEY McCORQUODALE,

Petitioner,

-against-

CHARLES BALKCOM, Warden, Georgia State Prison, and LEROY N. STYNCHCOMBE, Sheriff, Fulton County, Georgia,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the summary exclusion from petitioner's trial jury of fifteen prospective jurors en masse, based upon brief and ambiguous Witherspoon questions posed to them collectively by the District Attorney followed by their non-verbal responses, complied with the strict requirement for "unmistakable" clarity imposed by this Court in Witherspoon v. Illinois, 391 U.S. 510 (1968)?

2. Whether federal courts, in reviewing claims of Witherspoon error, are obligated to grant some deference to trial court's non-recorded judgments concerning a prospective juror's demeanor or non-verbal behavior?

3. Whether an instruction to a trial jury, clearly violative of Sandstrom v. Montana, 442 U.S. 510 (1979), on the only disputed element of the crime -- petitioner's mental state -- can ever be deemed "harmless constitutional error?"

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Petitioner Timothy Wesley McCorquodale respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, sitting en banc, in this case.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals en banc is reported at 721 F.2d 1493 (11th Cir. 1983)(en banc) and is annexed as Appendix A. The original panel opinion is reported at 705 F.2d 1553(11th Cir. 1983) and is annexed as Appendix B. The District Court opinion is reported at 525 F. Supp. 408 (N.D. Ga. 1981) and is annexed as Appendix C.

JURISDICTION

The en banc judgment of the United States Court of Appeals for the Eleventh Circuit was entered on December 30, 1983. A timely suggestion for rehearing was denied on February 1, 1984. A copy of the order denying rehearing is annexed as Appendix D. By order of the Eleventh Circuit entered February 1, 1984, the issuance of the mandate was stayed pending final

disposition of the case by this Court provided that a petition for certiorari is filed with the Court by March 2nd. A copy of the order staying issuance of the mandate is annexed as Appendix E. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury;"

the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;"

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Crime

Petitioner was tried for his participation in the murder of a young prostitute, Donna Marie Dixon (R. 1383). The facts of the crime, though gruesome, do not bear centrally upon the constitutional claims presented to this Court and consequently will not be fully set forth here.[1/] In brief, petitioner and a companion known only as "Leroy" were drinking heavily in a bar along Atlanta's "Peachtree Strip" area during the evening of January 16, 1974 when they became embroiled in a disagreement

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1/ A more thorough account of the facts developed at trial appears in the opinion of the Georgia Supreme Court on direct appeal. McCorquodale v. State, 233 Ga. 369, 211 S.E.2d 577 (1974).

over money with Donna Dixon (R. 1401-02) who was passing through Atlanta on her way to Florida (R. 1662). Leroy accused Ms. Dixon of having given $50.00 he had loaned her to a Negro pimp (R. 1422).

In the middle of this argument, petitioner, Leroy, Ms. Dixon, and petitioner's girlfriend, Bonnie Succaw, left the bar about 2:00 A.M. and went to an apartment shared by petitioner, Bonnie and another friend of Bonnie's, Linda Deering (R. 1423-25). During the following two and one-half hours, petitioner, Leroy and Ms. Dixon participated in what the District Court had termed "a sadomasochistic orgy" (R. 2906). Ms. Dixon's clothing was removed, and she was required to engage in intercourse and oral sexual relations with both Leroy and petitioner (R. 1432-33). According to Bonnie Succaw and Linda Deering, who remained in the apartment,[2/] as Ms. Dixon lay bound and gagged during some of this period (R. 1428, 1432) petitioner and Leroy inflicted cigarette burns and other wounds on her (R. 1428-31). During these events, Ms. Dixon did not scream or cry out for help to Bonnie, Linda or their neighbors (R. 1680-82). At one point, petitioner "granted Donna's request to go to the bathroom. At this time she was not tied or gagged and was unaccompanied" (R. 2905).

During Ms. Dixon's absence, petitioner suddenly announced that he was "going to have to kill her" (R. 1436). Bonnie fetched some rope (id.), which petitioner used to strangle Ms. Dixon as she left the bathroom (R. 1437-39). He then placed her lifeless body in a trunk, breaking some cartilege in her joints to fit her arms and legs into the container (R. 1440).

2/ Both Bonnie and Linda were initially arrested and charged with participation in Ms. Dixon's murder (Deposition of Thomas H. Antonion, May 14, 1979, at 3, 18). Despite the fact that neither had attempted to stop the torture or murder or to report the events to police during the 24-hour-period after they left the apartment and before petitioner was arrested, they were released from custody and were never indicted (Deposition, supra at 34-36). Both testified against petitioner at trial. Leroy, the other participant in these events, was never found by police.

Petitioner and Leroy, who had ingested large quantities of drugs and alcohol, soon collapsed on a living room sofa (R. 1444). Bonnie and roommate Linda left the apartment for a nearby beauty parlor, where Bonnie got her hair done (id.). Neither woman reported the crime to the police. The body of Donna Dixon was disposed of the next evening on a rural highway. Petitioner was arrested on the Atlanta Strip later that next evening after police received a tip from an informant who had discussed the crime with Bonnie Succaw (R. 1129).

The Selection of Petitioner's Jury

At the outset of the jury selection process in petitioner's case (R. 1196), the District Attorney addressed the assembled venire of sixty prospective jurors, requesting all those who were "conscientiously opposed to capital punishment" to stand (R. 1197). To the nineteen prospective jurors who stood up, the District Attorney posed a second question: "Would you allow your opinion about capital punishment to prevent you from voting for the death penalty in this case, regardless of what the evidence was?" (R. 1197-98)(emphasis added). Defense counsel immediately objected, stating "[t]hat's not a proper question;" however, the trial court permitted the District Attorney to continue (R. 1199). Jurors whose answer was "yes" were then directed to "step forward to the rostrum" (R. 1198). The District Attorney posed a third question to those standing jurors who had not come forward: "Would you allow your opinion about capital punishment to prevent you from being a fair and impartial juror on the issue of guilt or innocence . . .?" (R. 1199).

The District Attorney then moved "in relation to those ladies and gentlemen who have stepped forward in response to the question . . . that they be allowed to be excused for cause" (id.). Defense counsel opposed the motion:

> "MR. RIDLEY: If the Court please, to which we would object to their being excused. We

make the objection for each and every juror who is standing the same objection; we would object to them being excused for cause." (Id.)

The trial court overruled the objection and permitted the excusal of fifteen jurors (R. 1199-2001), none of whom had been questioned individually, none of whom had uttered a single word to clarify either their understanding of the questions, the meaning of their own answers to those questions, or their precise beliefs and attitudes toward the death penalty.

Later during voir dire, the District Attorney questioned and excluded prospective juror Sylvia R. Woodlief for cause, over timely defense objection, after the following exchange:

> "Q [L. Melvin England, Assistant District Attorney]: Would you be fair and impartial in this case, go by the evidence and the law, let your verdict speak the truth on that basis?
> A [Venireperson Sylvia R. Woodlief] Yes.
> Q Do you really believe in capital punishment?
> A No.
> Q You don't?
> A No, I don't. It's different being faced, you know, discussing capital punishment and sending someone to the electric chair.
> THE COURT: You didn't understand the question that was posed to you awhile ago?
> THE JUROR: Yes, I did at that time. I thought that under certain situations and possibly to rationalize this to myself,but sitting here and observing, I don't think I could do it, I really don't.
> THE COURT: All right, Mr. Ridley. That's grounds for excusal for cause.
> You may be excused.
> MR. RIDLEY [Defense Counsel]: Your Honor, may I invoke the same objections as to the others?
> THE COURT: Yes.
> You may be excused." (R. 1327-38).

Immediately after Ms. Woodlief had been dismissed, the District Attorney questioned and excluded for cause, over timely objection, prospective juror Allen L. Kidd:

> "Q [L. Melvin England, Assistant District Attorney]: Would you be a fair and impartial juror in this case and just let your verdict speak the truth based on the evidence that comes out in court and the law that his Honor gives you?

A [Venireperson Allen L. Kidd] Yes.
Q Do you really believe in capital punishment?
A To a certain extent.
Q To a certain extent?
A Yes, sir.
Q Do you feel there are cases where under the evidence it would be a right and just verdict?
A Well, in a way.
Q Well, when it comes down, like the last lady said, from a theoretical point to where a juror would be asked to vote, do you think you could really never vote for the death penalty no matter what the evidence was?
A No, sir.
Q You don't think you could?
MR. ENGLAND: If your Honor please, I believe it [sic] should be excused for cause.
THE COURT: You say you never could vote for it regardless of the circumstances?
THE JUROR: No, sir.
THE COURT: Did you hear the question that was posed to you just awhile ago? Did you understand the question?
THE JUROR: No, I did not understand.
THE COURT: You could not under any circumstances vote for the death penalty?
THE JUROR: No.
THE COURT: Is that right, under any circumstances?
THE JUROR: No.
THE COURT: In that case, you may be excused.
MR. RIDLEY [Defense Counsel]: May the same objection be noted?
THE COURT: Yes." (R. 1329-30).

The Trial Court's Charge On The Element Of Intent

From the outset of his trial, petitioner through counsel acknowledged taking part in the events leading to Donna Dixon's death (R. 1395-96). Indeed, the only seriously disputed issue was petitioner's mental state on the night the crime occurred. Defense counsel clearly informed the court in pretrial proceedings that petitioner had ingested alcohol and phenobarbital that evening (R. 985), and the defense sought to demonstrate to the jury on cross-examination of the State's medical witness that the victim may have been a masochist who participated willingly in some of the torture (R. 1554-56).

As the District Court found, "[d]efense counsel's closing argument indirectly suggested to the jury that the victim had willingly engaged in sadomasochistic activities with Petitioner and that Bonnie's testimony, to the extent that it suggested otherwise, was not credible" (R. 2906). During his closing argument, defense counsel directly addressed the issue of petitioner's state of mind during the crime:

> "Yes, he killed her. The evidence points to that and the State says that. We're going to get into some of this later on . . . Come right to the gut of it, he's guilty of the crime of murder. Maybe he's guilty and the Judge is going to charge you murder. Maybe he's guilty of manslaughter. The Judge is going to charge you that it has to be done with malice aforethought. You'll decide if it's malice or not. That's an issue I can't decide for you." (R. 1636, 1638).

The defense also sought an instruction to the jury on voluntary manslaughter (R. 1583)[3/] which was refused by the trial court (R. 1583-84). In its instructions the trial court charged the jury that

> "the State contends that the defendant is guilty of the offense of murder as charged in Indictment No. A-20205. A person commits murder when he unlawfully and with malice aforethought, either expressed [sic] or implied, causes the death of another human being." (Tr. 708).

The court stated that express malice is the "deliberate intention" to take life unlawfully (R. 1644), defining malice a second time as "the unlawful, deliberate intention to kill a human being without justification or mitigation or excuse, which intention must exist at the time of the killing" (id.). The court then instructed the jury:

3/ Under Georgia law, murder is defined as follows:

> "A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart." Former Ga. Code Ann. §26-1101(a)(1977 rev.)

Voluntary manslaughter differs from murder, as the District Court noted, principally by not requiring proof of the element of malice aforethought (R. 2913); see Former Ga. Code Ann. §26-1102 (1977 rev.).

> "The law presumes that a person intends to accomplish the natural and probable consequences of his acts and if a person uses a deadly weapon or instrumentality in the manner in which such weapon or instrumentality is ordinarily employed to produce death and thereby causes the death of a human being, the law presumes the intent to kill. This presumption may be rebutted" (R. 1645).

Petitioner posed a timely objection to this charge in his petition for a writ of habeas corpus, filed in the Superior Court of Fulton County on October 26, 1976.[4/]

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioner asserted in paragraphs 38 through 44 of his federal habeas corpus petition, filed on January 18, 1979, that the systematic removal of "seventeen jurors with conscientious or religious scruples against capital punishment," violated his "rights guaranteed by the Sixth, Eighth and Fourteenth Amendments," Fed. Petition, 12-13. He specifically identified each juror to whose removal he objected, id. at 13, quoted the entire voir dire examinations of prospective jurors Woodlief and Kidd, id., 13-14, and alleged that "[t]he other fifteen veniremen excluded for cause did not undergo any individual examination by the trial court or the attorneys," id. at 14.

In its October 21, 1981 opinion denying relief, the District Court, observing that in a "courtroom setting . . . it does take some measure of conviction for a juror to stand in announcement of his conscientious objection to the death penalty," McCorquodale v. Balkcom, 525 F. Supp. 408, 424 (N. D. Ga. 1981),

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4/ Under well-settled Georgia law at the time of his trial, a constitutional challenge to a jury instruction was cognizable if initially asserted in state habeas proceedings. Former Ga. Code Ann. §50-127(1). The Supreme Court of Georgia in fact expressly considered and decided this issue on the merits as part of its review of petitioner's state habeas proceedings. See McCorquodale v. Stynchcombe, 239 Ga. 138, 144, 236 S.E.2d 486, 489 (1977).

held that "it was not error for the court to fail to conduct an individual voir dire of the standing jurors," id., and that their mass, nonverbal action in stepping forward in response to the District Attorney's questions "did make it 'unmistakably clear' that they would vote against the death penalty no matter what the evidence showed." Id. Respecting the exclusions of venirepersons Woodlief and Kidd, the District Court, though finding that "they indicated some initial equivocation," held that "the 'bottom line' is unequivocal:"

> " . . . the Court knows from observing voir dire that the trial judge often must make judgments as to whether or not a prospective juror really means it when he says something. This Court believes some deference is due the judgment of the trial judge, who heard these two jurors as they stated that their reconsidered positions were that they could not impose the death penalty under any circumstances."

Id., at 425.

On appeal, petitioner contended that "the District Court misapplied both Witherspoon v. Illinois and controlling opinions of [the Circuit] . . . Court by dismissing [his] claim that seventeen prospective jurors were excluded from his jury in violation of the Sixth, Eighth and Fourteenth Amendments," Brief for Petitioner-Appellant, 23-32 (capitalization omitted). The panel agreed with petitioner, holding that the fifteen jurors removed en masse "were prematurely excused. The requirement that it be made unmistakably clear that the jurors would automatically vote against the imposition of capital punishment . . . was not met," McCorquodale v. balkcom, 705 F.2d 1553, 1558-59 (11th Cir. 1983), especially since "'[t]he critical question [...] is not how the phrases employed in this area have been construed by courts and commentators [but] . . . how they might be understood -- or misunderstood -- by prospective jurors,'" id. at 1559. As for juror Woodlief, the panel noted that "[n]o mention was made of an automatic vote or whether she could lay aside her personal view," and therefore, "the questioning of Miss Woodlief was insufficient," id. at 1560.

A majority of the en banc Court disagreed. It held that "group questioning and nonverbal responses do not constitute a per se violation of Witherspoon," McCorquodale v. Balkcom, 721 F.2d 1493, 1496 (11th Cir. 1983)(en banc), finding that "[t]he juror's [sic] responses in this case were unambiguous acts which were sufficient to make 'unmistakably clear' their answers to the Witherspoon question," id. at 1498, especially given the obligation of a "reviewing court [to] . . . grant some deference to the trial court's assessment of the juror's demeanor and clarity of his answer." Id. Turning to prospective jurors Woodlief and Kidd, the majority found that Woodlief's answers were "unambiguous and unequivocal." Id. at 1500. Likewise, it held that "[a]ny initial misunderstanding or uncertainty on Kidd's part was thus resolved by the subsequent questions asked of him and the unequivocality of his responses." Id. at 1502.

Petitioner's challenge to the trial court's instructions was asserted in paragraphs 64 through 67 of his federal habeas petition. Fed. Petition, 19-20. Petitioner alleged that the instructions "on presumptions of mental states which were elements of the offense . . . violated his rights against conviction except upon proof beyond a reasonable doubt . . . and shifted to him the burden of persuasion . . . in violation of his rights under the Fifth and Fourteenth Amendments . . . ." Id.

The District Court agreed that "[t]he objected to charge is quite similar to those struck down in Sandstrom" v. Montana, 442 U.S. 510 (1979) and other subsequent decisions, McCorquodale v. Balkcom, supra, 525 F. Supp. at 415, acknowledging that "[i]f the language of the charge is the controlling factor here, Petitioner's attack may well be meritorious." Id. at 416. However, it reasoned that because defense counsel freely admitted petitioner's involvement in the crime, the erroneous charge on the crucial mental element was harmless

error, and "did not render Petitioner's trial fundamentally unfair." Id.

On appeal, petitioner contended that "the District Court erred by disregarding the acknowledged violation of Sandstrom v. Montana which occurred during the trial court's instructions to petitioner's jury," Brief of Petitioner-Appellant 41-47 (capitalization omitted). He argued that "[e]ven were a harmless error analysis appropriate," id. at 47, "the intent necessary to establish malice, and therefore murder [rather than voluntary manslaughter], was the only disputed element of the crime . . . [and] therefore, the . . . error could not have been harmless 'beyond a reasonable doubt' and the reversal of petitioner's conviction is required." Id., 46-47.

The Circuit panel, citing Connecticut v. Johnson, __U.S. __, 74 L.Ed.2d 823 (1983), held that "[u]nder the peculiar circumstances of this case . . . the defendant's insistent assertions of guilt effectively withdrew the issue of intent from the jury." McCorquodale v. Balkcom, supra, 705 F.2d at 1556. The en banc majority concurred, holding that "[t]he district court . . . properly denied the writ as to the . . . contentio[n] . . . (2) that the trial court's instruction on intent operated unlawfully to shift the burden of proof from the state to the defendant." McCorquodale v. Balkcom, supra, 721 F.2d at 1502.

REASONS FOR GRANTING THE WRIT

I.

THE OPINION OF THE COURT OF APPEALS RESOLVES NOVEL ISSUES SIGNIFICANTLY AFFECTING THE ADMINISTRATION OF WITHERSPOON V. ILLINOIS

This Court should grant the writ to resolve important questions concerning the proper implementation and review of Witherspoon v. Illinois, 391 U.S. 510 (1968). An en banc majority of the Court of Appeals expressly noted that the Witherspoon questions it addressed are questions of "first impression":

> The manner in which voir dire was conducted in this case raises two questions of first impression: whether Witherspoon requires individual questioning of prospective jurors and whether their responses must be verbal. Necessarily involved in answering the last question is another issue which has yet to be resolved in the Witherspoon context: what degree of deference, if any, should be granted to a trial court's assessment of whether a juror's responses are 'unmistakably clear' so as to satisfy Witherspoon.

McCorquodale v. Balkcom, supra, 721 F.2d at 1496. In answering these questions the Court of Appeals held that brief en masse questioning of prospective jurors, followed by non-verbal responses, could satisfy Witherspoon's demand for "unmistakable" clarity in the expression of attitudes toward the death penalty. The Court of Appeals also held that, "[i]n assessing the adequacy of a venireperson's responses to Witherspoon questions, a reviewing court must grant some deference to the trial court's assessment of the juror's demeanor and clarity of his answer." 721 F.2d at 1498 (footnotes omitted).

Witherspoon has performed a crucial role in States' administration of their death penalty schemes in the post-Furman era, by maintaining a constitutionally impartial sentencing jury that is broadly representative of those persons in the community who can fairly consider what sentence to impose in a capital case. This Court, consequently, has not hesitated to examine lower court developments in the application of Witherspoon to ensure its integrity as a limit on exclusions for cause. See Davis v. Georgia, 429 U.S. 122 (1976); Adams v. Texas, 448

U.S. 38 (1980). The holding of the Court of Appeals in this case constitutes significant new Witherspoon law. If undisturbed, this case will necessarily affect both the manner in which capital juries will be selected within the Eleventh Circuit and the standards that will govern federal review of the jury selection process. Because of the wide-ranging impact of this decision of "first impression," the Court should exercise its jurisdiction to grant certiorari.

Briefly, the Court of Appeals approves a capital jury-selection technique that resulted here in the summary exclusion, in a matter of moments, of fifteen prospective jurors, although not a single Witherspoon-related question had been posed individually to any prospective juror. Nothing in the opinion would prevent State prosecutors and trial judges throughout the Eleventh Circuit from adopting wholesale this en masse voir dire methodology.

The advantages to the prosecution of such a summary procedure, both at trial and on appeal, will be as substantial as they are obvious. Only a limited opportunity will exist under such a procedure for venirepersons to indicate any hesitation or uncertainty about their understanding of the questions posed en masse. Scant opportunity will exist for venirepersons to indicate the strength of their conscientiously held views about capital punishment. The decision, in short, will mean a green light for the hasty examination and dismissal of death-scrupled jurors; it will mark a return to the mindset reflected by the trial judge in the Witherspoon case, who stated early in that voir process process, "Let's get these conscientious objectors out of the way, without wasting any time on them." Witherspoon v. Illinois, supra, 391 U.S. at 514.

Moreove, a procedure endorsing non-verbal "answers" at trial as acceptable responses to Witherspoon questions will yield, on appeal, additional advantages to the prosecution. A record devoid of any express testimony from prospective jurors will provide no basis for meaningful review, leaving excusals

virtually impervious to challenge. In this case, for example, fifteen venirepersons who indicated non-verbally some conscientious objection to the imposition of capital punishment were excused without uttering a single word about the nature or consequences of those beliefs. On such a record, it is virtually impossible to know "how the phrases employed . . . might [have been] understood -- or misunderstood -- by prospective jurors," Witherspoon v. Illinois, supra, 391 U.S. at 516 n.9. If the procedure is allowed, however, such lack of clarity will no longer form the basis for a defense objection. The Witherspoon standard articulated well over a decade ago will be severely compromised.

In addition to ratification of the en masse, non-verbal procedure, the Court of Appeals adopts a new substantive rule of Witherspoon review, a requirement that federal courts, when reviewing Witherspoon issues, must grant "some deference" to demeanor determinations of state trial judges. The Court's opinion admits to no exceptions to this new rule of federal review. As several members of this Court have recently observed, there is "substantial disarray among state and federal appellate courts as to the degree of deference, if any, due to a trial court's determination that a juror may be excused for cause under Witherspoon." Texas v. Mead, __U.S.__, 52 U.S.L.W. 3607 (U.S., Feb. 21, 1984)(No. 83-791)(Rehnquist, Burger, Ch.J., and O'Connor, JJ., dissenting from denial of certiorari). Yet in the fifteen years since this Court decided Witherspoon, we know of no federal appellate court until now that has expressly adopted a rule mandating appellate deference to a trial court's Witherspoon exclusions. Indeed, the Court of Appeals was able to cite only one federal case as authority for the broad rule it has created, a concurring opinion in a recent Fifth Circuit case, O'Bryan v. Estelle, 714 F.2d 365, 395 (Higginbotham, J.,

concurring).[5/]

The establishment of a new substantive rule so significantly affecting Witherspoon's administration and review in the lower federal courts is a question uniquely appropriate for prompt consideration from this Court. The close interrelationship between Witherspoon trial procedures approved here by the Court of Appeals and its adoption of a standard of appellate review requiring deference to the trial court make this case an even more appropriate vehicle for consideration of these questions.[6/]

5/ The one additional federal authority cited by several members of this Court in Texas v. Mead, supra, -- Darden v. Wainwright, 699 F.2d 1031 (11th Cir. 1983) -- was vacated and reversed on rehearing en banc. Darden v. Wainwright, No. 81-5590 (11th Cir. Feb. 22, 1983)(en banc).

6/ The analytical interplay between the Court's acceptance of the summary trial procedures and its requirement of "some deference" on appeal is shown by the Court's reliance upon "some deference" in its disposition of the challenge to the en masse venirepersons. 721 F.2d at 1498.

In addition, the Court also explicitly applies its "some deference" rule to justify removal of one of the individual prospective jurors, Sylvia Woodlief. 721 F.2d at 1500-1501.

II.

THE OPINION OF THE COURT OF APPEALS IS IN DIRECT AND SUBSTANTIAL CONFLICT WITH PRIOR DECISIONS OF THIS COURT

The decision of the Court of Appeals is in conflict with this Court's settled principles of Witherspoon jurisprudence. The consequences of this unprecedented opinion on the administration of Witherspoon in the Eleventh Circuit will thus transcend the individual result here, since the opinion will launch that Circuit on a course that will unquestionably carry it far from the principles of law established by this Court in the line of cases beginning with Witherspoon v. Illinois, supra, and continuing through Adams v. Texas, 448 U.S. 38 (1980). This Court should grant the writ to consider the direction in which the Court of Appeals' decision will take Witherspoon law.

In Witherspoon, the Court established a substantive standard that allows the exclusion of death-scrupled veniremen only in the narrowest of circumstances:

> We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. Nor does the decision in this case affect the validity of any sentence other than one of death. Nor, finally, does today's holding render invalid the conviction, as opposed to the sentence, in this or any other case.

Witherspoon v. Illinois, supra, 391 U.S. at 522 n.21 (emphasis in original).

Proper exclusions must satisfy a strict standard of proof: the record must establish a prospective juror's disqualifying beliefs with "unmistakable clarity." Witherspoon v. Illinois, supra, 391 U.S. at 522, n.21; Lockett v. Ohio,

438 U.S. 586, 596 (1978). See also Adams v. Texas, supra, 448 U.S. at 51. Therefore, under this Court's rulings, a prospective juror may not properly be excused unless his or her answer makes it unmistakably clear on the record that the voir dire questions have been properly understood, and that the strength of their views is so strong that the prospective juror would "automatically" vote against death despite his or her obligations to abide by their oath to follow the law.

However, Witherspoon cautioned that even irrevocable commitment against capital punishment on the part of a veniremember was not, in and of itself, a basis for a proper exclusion: "It is entirely possible, of course, that even a juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its aboliton could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State." 391 U.S. at 514, n.7.[7/] Later, in Adams v. Texas, the Court summarized the controlling principle as follows: "This line of cases establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." 448 U.S. at 45. Witherspoon and its progeny in this Court thus require an inquiry into the strength of a veniremember's views.

7/ In Boulden v. Holman, 394 U.S. 478, 483-84 (1969), the Court reiterated:

> [I]t is entirely possible that a person who has "a fixed opinion against" or who does not "believe in" capital punishment might nevertheless be perfectly able as a juror to abide by existing law -- to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case.

Moreover, Witherspoon also prohibited courts from making assumptions about the personal views and positions of prospective jurors. "Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position." Witherspoon v. Illinois, supra, 391 U.S. at 516 n.9; see also Boulden v. Holman, supra, 394 U.S. at 482; Maxwell v. Bishop, 398 U.S. 262,265 (1970).

The voir dire procedures sanctioned in this case by the Court of Appeals failed in significant respects to accomplish the task required by Witherspoon. First, the method of questioning provided no assurance to the trial court that the venirepersons properly understood the questions that were posed. Witherspoon held that the "critical question" is how a prospective juror understands -- or misunderstands -- the questions posed on voir dire. Group questioning defeats any opportunity for the trial judge to make an informed decision on this critical question. Instead, the judge must make simultaneous determinations that each of a potential host of jurors -- here, at least nineteen -- who stand in response to the first en masse question properly understood that question. On the record of this case, neither the most alert and sensitive trial judge nor any reviewing court could confidently claim such knowledge.

The Court of Appeals, indeed, did not suggest how it, or the trial court, could have known how each of these venirepersons interpreted the questions posed. Instead, the Court necessarily assumed that the questions were properly understood, relying solely on its view that, "the Witherspoon questions were strongly and clearly worded so as to evoke an affirmative answer only from those jurors with unequivocating beliefs." McCorquodale v. Balkcom, supra, 721 F.2d at 1497-8. That analysis simply begs the question which this Court has held is "critical." The majority may believe that the questions were so strongly and clearly worded that, had they been on the venire, they would have understood them. However, the Court emphasized

in Witherspoon that the issue is "not how courts or commentators" understand the questions, but instead how each excluded prospective juror actually understood them. Here, we simply do not know.

The wisdom of this Court's rule, and the fundamental error of the Court of Appeals' approach, is dramatically illustrated in this case by the subsequent individual examination of Mr. Kidd. He did not stand up or step forward during the en masse voir dire. When on subsequent individual voir dire he indicated that he had reservations about capital punishment, the trial court inquired whether he had understood the questions which had previously been asked. Kidd replied that he had not understood them.

This Court's mandated focus on each venireperson's proper understanding as the "critical question" is a recognition of the principle that where a prospective juror does not properly understand the question, any answers he or she may give in response cannot form a foundation for a proper disqualification. A prospective juror's flawed understanding of the question posed necessarily produces a flawed and inadequate answer. When the only method employed on voir dire is group questioning, the opportunity for juror misunderstanding is too great to conclude that the stringent standards of Witherspoon have been met. Only individual voir dire can satisfy these rigorous substantive and procedural requirements.

The Eleventh Circuit failed to heed and follow this Court's directive to assure that the questions are properly understood. That failure should compel this Court to grant the writ to re-establish this rule in that Court.

In begging the "critical question" of how each venireperson understood the questions posed en masse, the Court of Appeals also violated this Court's rule prohibiting assumptions about the views of prospective jurors. The Court assumed that none of the excluded fifteen jurors misunderstood the questions posed, despite the fact that one juror, Mr. Kidd, later acknowledged that he, at least, had not understood those questions.

Petitioner challenged one of the two questions posed by the District Attorney because of its facial ambiguity: it asked whether the jurors could impose a sentence of death "in this case" regardless of the evidence that might be developed at trial. In rejecting that challenge, the Court of Appeals expressly assumed it could know which of two possible interpretations of that question had been understood by each of the fifteen. The Court of Appeals speculated that

> [T]he argument ignores the clear import of the voir dire question. The phrase 'in this case' was not intended to refer specifically to the petitioner's case, and a reasonable juror would not have interpreted the phrase as asking him in advance if he 'would in fact' vote for the death penalty in the petitioner's case. 721 F.2d at 1499.

The issue in evaluating a Witherspoon exclusion, of course, is not what a "reasonable juror" may have understood by the question, but what the excluded juror thought it meant. On the present record, no court can confidently know which interpretation these fifteen jurors adopted.

When it turned to an evaluation of the non-verbal responses permitted by the trial court here, the Court of Appeals created a rule that federal courts, when reviewing Witherspoon claims, "must grant some deference to the trial court's assessment of the juror's demeanor and clarity of his answer." Id. The Court concluded that each juror questioned en masse satisfied the requirement of unmistakable clarity by applying this newly created "some deference" rule.

This approval of group questioning, non-verbal responses and mandatory reliance on ostensible demeanor determinations, establishes a fateful precedent for the future administration of Witherspoon in the Eleventh Circuit. This Court in Witherspoon established a strict standard of proof for proper exclusion: a juror's disqualifying view must be demonstrated with "unmistakable clarity." The Court of Appeals, however, has approved of procedures that empty this Court's strict standard of any substantial

meaning. These new procedures are replete with the opportunity for mistake in assessing the views of the venirepersons. No safeguards have been employed which produce confidence in the hasty, unrecorded judgment of a trial court about the nature or strength of the death penalty views of excluded jurors. The approach adopted by the Court of Appeals converts record silence into affirmative statements--ostensibly "unmistakable" statements--about jurors' feelings on capital punishment. The Court should grant the writ to consider the soundness of the Eleventh Circuit's modification of Witherspoon's requirement of unmistakable clarity.

III.

THE OPINION OF THE COURT OF APPEALS CREATES A NEW AND QUESTIONABLE STANDARD FOR FEDERAL APPELLATE REVIEW OF WITHERSPOON EXCLUSIONS

This Court should also grant the writ to review the new rule of appellate review created by the Court of Appeals. That rule establishes, for the first time, a mandatory federal rule that, "[i]n assessing the adequacy of a venireperson's response to Witherspoon questions, a reviewing court must grant some deference to the trial court's assessment of the juror's demeanor and clarity of his answer." McCorquodale v. Balkcom, supra, 721 F.2d at 1498. By its express terms, this new mandatory rule of deference to demeanor determinations is applicable at the District Court level as well as in the Court of Appeals.

Nothing in any of this Court's prior Witherspoon cases suggests any basis for such a mandatory and automatic deference to presumed demeanor determinations by the trial court. Indeed, in the fifteen years since the Witherspoon decision, no federal court to our knowledge has previously announced a rule that deference to demeanor determinations by the trial court is required in evaluating a venireperson's voir dire responses. The only authority cited by the Court of Appeals in support of its new rule is a concurring opinion of one judge of

the Fifth Circuit. O'Bryan v. Estelle, 714 F.2d 365, 395 (5th Cir. 1983). Cf. Texas v. Mead, __U.S.__, 52 U.S.L.W. 3607, 3608 (U.S., Feb. 21, 1984)(No. 83-791)(Rehnquist, Burger, Ch.J., and O'Connor, JJ., dissenting from denial of certiorari).

This newly created imperative for federal court review appears to stand in direct conflict with this Court's requirement of "unmistakable clarity." That stringent standard, in effect, will be repealed if the new deference rule is permitted to stand. Whatever ambiguity regarding a venireperson's views may appear in the record, the granting of "some deference" to the trial court's purported demeanor determinations (which apparently do not themselves have to be placed on the record by the trial court) will plug those record holes. The "some deference" rule will thus become a judicial wild card to be played by a reviewing federal court without significant or reasoned limitation. The unfettered judicial subjectivity which the "some deference" rule introduces to Witherspoon law will turn this Court's standard of unmistakable clarity inside out.

The facts of this case illustrate the judicially unmanageable standard that the "some deference" rule will produce. In evaluating the en masse disqualifications, the Court of Appeals relied heavily upon its newly created rule:

> "The juror's responses in this case were unambiguous acts which were sufficient to make unmistakably clear their answers to the Witherspoon questions. Potential jurors were asked to stand up if conscientiously opposed to the death penalty and to step forward if either unequivocally opposed to the death penalty or if their views could prevent impartial deliberation of the defendant's guilt. The trial court was able to observe the jurors' responses and demeanor for hesitancy or uncertainty that would have indicated that their responses were not 'unmistakably clear.'"

McCorquodale v. Balkcom, supra, 721 F.2d at 1498. As the dissent pointed out, the en masse circumstances here created conditions under which demeanor judgments should have been virtually impossible. 721 F.2d at 1506. Indeed, it is

difficult to postulate a situation less deserving of "some deference" to demeanor than the en masse situation presented here.

The Court also applied its new rule to the veniremember Woodlief. Woodlief did not respond affirmatively to the en masse Witherspoon interrogation. When subsequently questioned individually by the District Attorney, she stated that she could "be fair and impartial in this case, go by the evidence and the law, let . . . [her] verdict speak the truth on that basis . .." She was never asked whether she would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial before her. She never said she would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed. She never stated on the record that she was not able to put aside her personal beliefs about capital punishment and follow the law. The one time she was asked whether she could follow the juror's oath, she answered, on individual voir dire, that she could. The answer which she volunteered to the trial judge, and upon which he based his excusal decision, was in response to no pending specific Witherspoon question. Yet, the Court of Appeals sustained her excusal upon the following analysis:

> This narrative evidences an individual who understood the questions asked, reflected upon them, and concluded that she could not impose the death penalty. Her statements, coupled with the trial judge's ability to observe Woodlief's tone of voice and demeanor for indecisiveness, allows only one reasonable interpretation of Woodlief's repetitive statement, "I don't think I could do it, I really don't": she unequivocally believed that she could not impose the death penalty regardless of the evidence presented.

721 F.2d at 1500-01. As the dissent points out, there is no functional difference between the Witherspoon voir dire of Ms. Woodlief and that of Mr. Harrison in Granviel v. Estelle, 655 F.2d 673 (5th Cir. 1981); Ms. Turpin in Hance v. Zant, 696 F.2d 940 (11th Cir. 1983); or Ms. Colby in Witt v. Wainwright, 714 F.2d 1069 (11th Cir. 1983). See McCorquodale v. Balkcom, supra,

721 F.2d at 1508-1510. Yet, in each of those cases, panels of the Court of Appeals found Witherspoon violations. Here, with the "some deference" rule supplying "evidence" otherwise missing from the record, the Court has reached the opposite conclusion. Moreover, the Court of Appeals points to nothing in the voir dire record which indicates that the trial judge in fact relied upon a demeanor judgment in reaching the conclusion that Ms. Woodlief should be excluded. Notwithstanding this record silence, the Court of Appeals applied its demeanor rule imputing such reliance to the trial court as a matter of law.

The Court should grant the writ to review the newly established deference rule. Its presents a substantial question of federal law, see Texas v. Mead, supra, 52 U.S.L.W. at 3609, and if allowed to stand, it will convert this Court's Witherspoon principles, at least in the Eleventh Circuit, into a standardless, arbitrary, and subjective judicial analysis wherein record inadequacies will be filled by reliance upon assumed demeanor judgments, regardless of whether in fact demeanor was the basis of a trial court's rulings. This "rule of the gaps," unless reviewed and corrected by this Court, will stand Witherspoon on its head.

IV

THE COURT OF APPEALS' HOLDING THAT JURY INSTRUCTIONS -- CLEARLY UNCONSTITUTIONAL UNDER SANDSTROM v. MONTANA -- CAN BE, AND IN THIS CASE WERE, HARMLESS ERROR PRESENTS AN IMPORTANT, UNRESOLVED CONSTITUTIONAL QUESTION

In Sandstrom v. Montana, 442 U.S. 510 (1979), the Court held that an instruction informing Sandstrom's trial jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts," id. at 512, violated due process, since a reasonable juror "may have interpreted the judge's instruction as constituting either a burden-shifting presumption like that in Mullaney [v. Wilbur, 421 U.S. 684 (1975)], or a conclusive presumption like those in Morissette [v. United States, 342 U.S. 246 (1952)] and [United States v.] United States Gypsum Co., [438 U.S. 422 (1978) and] either interpretation would have deprived defendant of his right to the due process of law." Id. at 524.

The Court expressly declined to reach the question of whether such a violation could ever be harmless error since that issue "was [not] considered by the Supreme Court of Montana." Sandstrom v. Montana, supra, 442 U.S. at 527. Subsequently, in Connecticut v. Johnson, __U.S. __, 74 L.Ed.2d 823, 826 (1983), this Court, noting that "[s]ince Sandstrom, courts have taken different approaches to the harmless error problem . . . granted certiorari. . . to resolve the conflict." Four members of the Court reasoned in Johnson that "[a]n erroneous presumption on a disputed element of the crime renders irrelevant the evidence on the issue because the jury may have relied upon the presumption rather than upon the evidence," id. at 833, and that "[s]uch an error [would] deprive [a party] of 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error,'" id. at 835, quoting Chapman v. California, 386 U.S. 18, 23 (1967). However, Johnson did not

resolve this issue, since no full majority agreed on the merits of the issue. The Court has subsequently granted certiorari in Koehler v. Engle, __U.S.__, 52 U.S.L.W. 3291 (U.S., Oct. 11, 1983)(No. 83-1) to address the question, among others, of "the application of the harmless error test, set forth in Chapman v. California, 386 U.S. 18 (1967), to allegations of constitutional defect in jury instructions," 52 U.S.L.W. at 3145.

In petitioner's case, the Court of Appeals resolved this important issue against him, adopting the panel's finding that the clear Sandstrom error which infected the trial court's instructions was nevertheless harmless, since "the defendant's insistent assertions of guilt effectively withdrew the issue of intent from the jury." McCorquodale v. Balkcom, supra, 705 F.2d at 1556. Yet the only significant disputed issue at the guilt-or-innocence phase of petitioner's trial was his mental state during the crime. A finding by the jury that, because of his inebriation and other factors, petitioner lacked the intent during the crime necessary to constitute malice would have led, under Georgia law, to a verdict of manslaughter, not murder. It was precisely in instructing the jury on the intent element of malice that the trial court invoked the unconstitutional presumption. This case thus raises both the broad question, already under consideration by the Court, of whether Sandstrom error can ever be harmless, and the collateral question concerning the circumstances, if any, under which a defendant might be deemed by his own defense strategy to have rendered any constitutional error harmless. Therefore, the Court should grant certiorari to address these issue, or alternatively, should hold this case pending its resolution of Koehler v. Engle, supra.

CONCLUSION

The petitioner for certiorari should be granted.

Dated: March 2, 1984.

Respectfully submitted,

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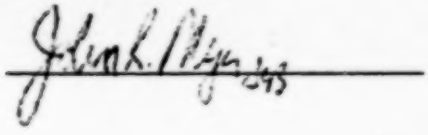
BY: 

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ATTORNEYS FOR PETITIONER

Timothy Wesley McCORQUODALE, Petitioner-Appellant,

v.

Charles BALKCOM, Warden, Georgia State Prison, et al., Respondents-Appellees.

No. 82-8011.

United States Court of Appeals, Eleventh Circuit.

Dec. 30, 1983.

Defendant who had been convicted of first-degree murder and sentenced to death, after exhausting state appellate and post-conviction remedies, brought petition for federal writ of habeas corpus. The United States District Court for the Northern District of Georgia, Orinda D. Evans, J., 525 F.Supp. 408, denied petition, and appeal was taken. The Court of Appeals, 705 F.2d 1553, affirmed in part and reversed in part, ruling that defendant's constitutional right to fair and impartial jury had been violated, and Court thereafter elected to hear case en banc. The Court of Appeals, Kravitch, Circuit Judge, held that: (1) prosecutor's group questioning of venirepersons regarding their attitudes on death penalty and their nonverbal responses did not violate defendant's constitutional right to properly death-qualified jury; (2) question put to venirepersons regarding their attitudes on death penalty sufficiently protected defendant's right to have excluded only those venirepersons who were unequivocally opposed to death penalty; and (3) two venirepersons were properly excused for cause, where totality of circumstances regarding their questioning showed that they could not impose death penalty regardless of evidence presented.

District Court's denial of petition affirmed.

Clark, Circuit Judge, dissented and filed opinion in which Hatchett, Circuit Judge, joined.

Godbold, Chief Judge, dissented and filed statement in which Johnson, Circuit Judge, joined.

1. Jury ⇐131(13)

Prosecutor's group questioning of venirepersons regarding their attitudes on death penalty and their nonverbal responses, by standing up and stepping forward to reflect their attitudes, did not violate defendant's constitutional right to properly death-qualified jury, where such procedure served to clearly establish venirepersons' unequivocal opposition to death penalty, venirepersons were not prevented from indicating that they did not understand questions or from asking for clarification, trial court did not prevent defense counsel from asking further questions or requesting individual examination of venirepersons, and defense counsel entered only general objections to procedure.

2. Jury ⇐131(13)

Key factors to be examined in determining whether defendant was granted his constitutional right to properly death-qualified jury are whether trial court utilized effective means of eliciting answers from venirepersons reflecting their attitudes on death penalty, whether crucial questions were asked, and whether defendant failed to specifically object to voir dire method or request individual questioning.

3. Jury ⇐131(13)

In determining whether venirepersons' nonverbal responses to questions regarding death penalty were sufficient to preserve defendant's constitutional right to properly death-qualified jury, relevant inquiry is whether such nonverbal responses served in particular case to make unmistakably clear excused venirepersons' unequivocal opposition to death penalty or their inability to impartially decide defendant's guilt.

4. Criminal Law ⇐1144.8

In assessing adequacy of venireperson's response to questions to determine his attitude on imposition of death penalty, reviewing court must grant some deference to

trial court's assessment of venireperson's demeanor and clarity of his answer, as his statement, whether verbal or nonverbal, as reduced to written record, may not adequately convey strength of juror's response.

5. Jury ⇐131(17)

Prosecutor's question to venirepersons as to whether their opinion about capital punishment would prevent them from voting for death penalty "in this case," regardless of evidence presented, did not violate defendant's constitutional right to properly death-qualified jury by expecting venirepersons to say in advance of trial whether they would in fact vote for extreme penalty of death in particular case before them.

6. Jury ⇐131(17)

Where venirepersons were asked whether their views on death penalty would cause them to automatically vote against death penalty or preclude them from deliberating impartially on defendant's guilt, defendant's right to properly death-qualified jury was preserved, and it was not error to fail to ask venirepersons further question as to whether they could subordinate their views to their oath as jurors to obey law.

7. Jury ⇐33(2.1)

Fact that juror initially stated that he could follow his oath and then later changed his mind because of his belief on death penalty does not demonstrate that defendant's constitutional right to properly death-qualified jury has been violated; it is juror's ultimate conclusion by which court judges whether juror is unequivocally opposed to death penalty.

8. Jury ⇐33(2.1), 108

Where venireperson, in response to question as to whether she could impose death penalty if evidence warranted it, responded that "I don't think I could do it, I really don't," and totality of circumstances of voir dire suggested that venireperson could not impose death penalty, trial court properly excused venireperson for cause, and such action did not violate defendant's constitutional right to properly death-qualified jury.

9. Jury ⇐108

Where venireperson was asked four times during individual voir dire if he could vote for death penalty under any circumstances, and each time he answered "no," trial court did not err in excusing venireperson for cause, notwithstanding that he stated that he did not initially understand question asked at group voir dire regarding attitudes on death penalty.

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Lewis R. Slaton, H. Allen Moye, Janice G. Hildenbrand, Mary Beth Westmoreland, Asst. Attys. Gen., Atlanta, Ga., for respondents-appellees.

Appeal from the United States District Court for the Northern District of Georgia.

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

KRAVITCH, Circuit Judge:

The petitioner, Timothy Wesley McCorquodale, was convicted by a jury of first degree murder and sentenced to death.[1] The Georgia Supreme Court affirmed the conviction and sentence on direct appeal, *McCorquodale v. State*, 233 Ga. 369, 211 S.E.2d 577 (1974), and the United States Supreme Court denied a petition for writ of certiorari. *McCorquodale v. Georgia*, 428 U.S. 910, 96 S.Ct. 3223, 49 L.Ed.2d 1218 (1976).

1. The facts and circumstances of the homicide are summarized in the Georgia Supreme Court's opinion, *McCorquodale v. State*, 233 Ga. 369, 211 S.E.2d 577 (1974). The Georgia court upon completing review of the case observed that, "In no case we have reviewed has the depravity of the defendant and the torture of the victim exceeded that established by the evidence and testimony of the witnesses in this case." We will limit our recitation of the facts to those relevant to the issues raised on appeal.

The petitioner subsequently filed a writ for habeas corpus in state court, which was denied, *McCorquodale v. Stynchcombe*, 239 Ga. 138, 236 S.E.2d 486 (1977), cert. denied, 434 U.S. 975, 98 S.Ct. 534, 53 L.Ed.2d 467 (1977). McCorquodale then filed an extraordinary motion for a new trial based upon newly discovered evidence, which, after an evidentiary hearing, was also denied, and the denial was affirmed on appeal. *McCorquodale v. State*, 242 Ga. 507, 249 S.E.2d 211 (1978).

After his failure to obtain relief in the state courts, McCorquodale brought the present petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Northern District of Georgia. He raised six contentions in support of his petition, attacking both his conviction and his sentence. The district court found all of the arguments to be without merit and denied habeas corpus relief. *McCorquodale v. Balkcom*, 525 F.Supp. 408 (N.D.Ga.1981). A panel of this court affirmed the denial of relief as to five of McCorquodale's arguments, but reversed as to his sentence, directing that the writ of habeas corpus issue because the petitioner's constitutional right to a fair and impartial jury under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) had been violated. *McCorquodale v. Balkcom*, 705 F.2d 1553 (11th Cir.1983). This court elected to hear the case en banc, and we now hold that the district court properly denied the writ in concluding that the voir dire procedures comported with *Witherspoon* standards.

I. *The Witherspoon Rule*

The Supreme Court in *Witherspoon v. Illinois* enunciated the rule that:

> a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected.

391 U.S. at 522, 88 S.Ct. at 1777 (footnotes omitted). The Court clarified in a footnote the two reasons why a juror could be excused for cause in the *Witherspoon* context:

> We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made it unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*.

391 U.S. at 522, n. 21, 88 S.Ct. at 1777, n. 21 (emphasis in original). *Witherspoon's* holding thus struck a balance between "the state's legitimate interest in obtaining jurors who could follow their instructions and obey their oaths," *Adams v. Texas*, 448 U.S. 38, 44, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980) and a defendant's right to have a neutral jury not "uncommonly willing to condemn a man to die." *Witherspoon*, 391 U.S. at 521, 88 S.Ct. at 1776; *see also Adams*, 448 U.S. at 44, 100 S.Ct. at 2526.

The petitioner advances three arguments as to why the voir dire proceedings in his case violated *Witherspoon's* standards: (1) the collective questioning of the venirepersons and their non-verbal responses failed to ensure that each individual juror would unequivocally refuse to impose the death penalty or impartially deliberate on the defendant's guilt; (2) the *Witherspoon* questions asked at voir dire were insufficient; and (3) the questions asked to and the responses by two of the jurors dismissed for cause, jurors Woodlief and Kidd, were insufficient.

II. *Group Questioning and Non-Verbal Responses*

[1] At voir dire the prosecutor collectively asked a series of three questions to the approximately sixty jurors comprising the jury pool. The prosecutor first asked:

> Are you conscientiously opposed to capital punishment? If you're conscientiously opposed to capital punishment, if you will, please stand. If you are not conscientiously opposed to capital punishment, remain seated.

Nineteen jurors stood up in response to this question.

The prosecutor then posed the two additional questions required by *Witherspoon* to those jurors who had stood up, asking them to step forward if they would answer the question affirmatively:

> The first question is this. Would you allow your opinion about capital punishment to prevent you from voting for the death penalty in this case, regardless of what the evidence was?
>
> . . . .
>
> The [second] question is this. Would you allow your opinion about capital punishment to prevent you from being a fair and impartial juror on the issue of guilt or innocence as distinguished from the issue of punishment? If you would, would you please step forward.

The prosecutor then moved the court to dismiss the fifteen jurors who had stepped forward. The court granted the motion over defense counsel's general objection.

The manner in which voir dire was conducted in this case raises two questions of first impression:[2] whether *Witherspoon* requires individual questioning of prospective jurors and whether their responses must be verbal. Necessarily involved in answering the last question is another issue which has yet to be resolved in the *Witherspoon* context:[3] what degree of deference, if any, should be granted to a trial court's assessment of whether a juror's responses are "unmistakably clear" so as to satisfy *Witherspoon*.

We hold that group questioning and nonverbal responses do not constitute a per se violation of *Witherspoon*. *Witherspoon* governs the *substance* of the inquiry to be made, not its *form*, and only requires that the voir dire method used for questioning and receiving responses allows a court to determine *in the particular case at hand* that the excluded venirepersons "made unmistakably clear" that their attitude toward the death penalty would either automatically cause them to vote against the death penalty or prevent them from impartially deciding the defendant's guilt.

In this case, posing the *Witherspoon* questions to the jury pool as a group did not prevent the trial court from making this necessary determination. The questions asked by the prosecution went immediately to the relevant *Witherspoon* inquiries and carefully tracked the wording in *Witherspoon*.[4] Furthermore, the responses to be

2. *Cf. Goodwin v. Balkcom*, 684 F.2d 794, 816 (11th Cir.1982), cert. denied, — U.S. —, 103 S.Ct. 1798, 76 L.Ed.2d 364 (1983) ("Depending upon the comprehensiveness of the [*Witherspoon*] questions addressed to a potential juror, it may be possible in some instances for a court to decide that a response other than verbal is unquestionably unambiguous. We leave that question for another case . . . .").

3. *See* discussion in *O'Bryan v. Estelle*, 714 F.2d 365, 371–73 (5th Cir.1983).

4. Questions that have been held inadequate for gauging the unequivocality of a juror's response are those that have inquired only as to the "conscientious scruples" of the juror or asked whether the death penalty might "affect" his deliberations, without making the ultimate inquiry of whether the juror's views are so strong that they would preclude him from following his oath. *See, Adams v. Texas*, 448 U.S. at 48, 100 S.Ct. at 2528, (questions as to whether possibility of death penalty would "affect" juror's deliberations); *Segura v. Patterson*, 403 U.S. 946, 91 S.Ct. 2280, 29 L.Ed.2d 856 (1971) *rev'g without opinion*, 402 F.2d 249 (10th Cir. 1971); *Boulden v. Holman*, 394 U.S. 478, 483–4, 89 S.Ct. 1138, 1141–42, 22 L.Ed.2d 433 (1969) (COURT: "Do you have a fixed opinion against capital punishment?"); *Maxwell v. Bishop*, 398 U.S. 262, 90 S.Ct. 1578, 26 L.Ed.2d 221 (1970) (jurors asked whether they had "conscientious scruples" against death penalty); *Witt v. Wainwright*, 714 F.2d 1080 (11th Cir.1983) (question as to whether death penalty would "interfere" with juror's deliberations); *Granviel v. Estelle*, 655 F.2d 673, 677 (5th Cir.1981) (QUESTION: "You just don't feel like you would be entitled to take another person's life . . . ?"); *Burns v. Estelle*, 626 F.2d 396 (5th Cir.1980) (en banc) (question as to whether death penalty would "affect" juror's deliberations).

The questions asked in this case did not contain ambiguous language that would render

made by those venirepersons responding affirmatively to the questions—standing up in answer to the first question and stepping forward as to the next two questions—were clearly stated to the jurors and were not susceptible to misunderstanding.

The petitioner argues, however, that the group questioning was an "all or nothing" affair, and that individual questioning may have revealed that certain jurors were equivocating in their attitudes. This argument is without merit for several reasons.

[2] First, nothing in the record indicates that the venirepersons were prevented from indicating that they did not understand the questions or from asking for clarification. Second, the court did not prevent defense counsel from asking further questions or requesting individual questioning of venirepersons; defense counsel entered only general objections without specifying the precise nature of his objection. Once the state clearly establishes a potential juror's unequivocal opposition to the death penalty, which in this case the questions asked and the jurors' responses accomplished, it is then incumbent upon the defendant to make an objection specifying why the juror should not be dismissed and to request further questions that would clarify any perceived ambiguity or equivocating by the juror.[5] *Cf. Goodwin v. Balkcom*, 684 F.2d at 816 (defense counsel's failure to raise *Witherspoon* violation is evidence of ineffectiveness); *Burns v. Estelle*, 626 F.2d 396, 398 (5th Cir.1980) (en banc)[6] (error to deny defense counsel's request for further questioning). *See also, O'Bryan v. Estelle*, 714 F.2d at 378; *Porter v. Estelle*, 709 F.2d 944 (5th Cir.1983). Third, the *Witherspoon* questions were strongly and clearly worded

them invalid under the above line of cases. The petitioner argues that the use of the word "prevent" in the questions was ambiguous. We note, however, that the word "prevent" was a word chosen by the *Witherspoon* court to be used in the second question to be asked. 391 U.S. at 522 n. 21, 88 S.Ct. at 1777 n. 21. Furthermore, as "prevent" is used within the context of the questions posed, it conveys the proper meaning that the juror must find that he *could not* impose the death penalty or deliberate impartially on the defendant's guilt.

5. The dissent states that Georgia law, OCGA 15–12–164, prohibits defense counsel from individually questioning prospective jurors after the statutory *Witherspoon* question is asked pursuant to OCGA 15–12–164(a)(4), because, if the juror's answer is affirmative, he is automatically excused for cause. *Infra*, dissent at 1504–1505, citing *Arnold v. State*, 236 Ga. 534, 224 S.E.2d 386, 390 (1976) and *Jordan v. State*, 247 Ga. 328, 276 S.E.2d 224, 234 (1981).

Jordan and Arnold, however, stand only for the proposition that *general* individual *voir dire* (preliminary to peremptory challenges) is not allowed at the OCGA 15–12–164 *voir dire* stage (excusal for cause). The statute does not forbid additional questioning based upon answers to the statutory questions, and the case law interpreting the statute holds that although additional examination is not a matter of right, the trial judge has the discretion to allow further inquiry. *Ford v. State*, 202 Ga. 509, 44 S.E.2d 263, 265 (1947) (interpreting GA.CODE 59–808, predecessor of OCGA 15–12–164); *Hall v. State*, 64 Ga.App. 644, 13 S.E.2d 888, 889 (1941) (scope of inquiry based on statutory questions concerning juror's competency within judge's discretion). *See also, Goodwin v. Balkcom*, 684 F.2d at 816 (defense counsel in Georgia capital case erred because he could have, but did not, question a juror that judge erroneously concluded had stated she was unequivocally opposed to the death penalty).

Furthermore, a view of Georgia cases reveals that defense counsel frequently participate in the *Witherspoon* questioning of jurors. See, *Mincey v. State*, 251 Ga. 255, 304 S.E.2d 882, 889–90 (1983); *Castell v. State*, 250 Ga. 776, 301 S.E.2d 234, 244–46 (1983); *Allen v. State*, 248 Ga. 676, 286 S.E.2d 3 (1982); *Cofield v. State*, 247 Ga. 98, 274 S.E.2d 530, 535–36 (1981) (defense counsel's further questioning of juror on *Witherspoon* issue allowed, but not questions outside scope of *Witherspoon's* holding). *Cf. Mincey*, *supra* 304 S.E.2d at 890 (defense counsel allowed to question juror further as to OCGA 15–12–164 question concerning juror's ability to be fair and impartial). Thus, although defense counsel does not have an absolute right under Georgia law to ask or request questions beyond the basic *Witherspoon* inquiry of OCGA 15–12–164, if defense counsel makes a nonfrivolous, specific objection to the dismissal of a juror because of ambiguity, and his request for further questioning is denied, such denial would fall within the ambit of *Burns*, *supra*, as the reviewing court would have to speculate about the juror's response to a crucial question.

6. In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (en banc), the Eleventh Circuit adopted as binding precedent decisions of the former Fifth Circuit decided prior to October 1, 1981.

so as to evoke an affirmative answer only from those jurors with unequivocating beliefs. In this sense, the petitioner's "all or nothing" argument would actually work in his favor—initially equivocating jurors who might on further questioning answer the *Witherspoon* questions "yes" would remain seated, and only those jurors who could answer the questions "yes" without hesitation would stand. Finally, even where individual questioning is conducted, a juror must eventually make the "all or nothing" decision of answering the *Witherspoon* questions "yes" or "no."[7] As used in this case, therefore, group questioning complied with *Witherspoon*'s directive.[8]

[3] The analysis of group voir dire developed above equally applies to the adequacy of the non-verbal responses. The relevant inquiry is whether the non-verbal responses served *in this case* to make "unmistakably clear" the excused jurors' unequivocal opposition to the death penalty or their inability to impartially decide the defendant's guilt. *Witherspoon v. Illinois*, 391 U.S. at 522 n. 21, 88 S.Ct. at 1777 n. 21.

[4] In assessing the adequacy of a veniperson's response to *Witherspoon* questions, a reviewing court must grant some deference to the trial court's assessment of the juror's demeanor and clarity of his answer. Whether verbal or non-verbal, a response once reduced to a written record may not adequately convey the strength of the juror's response. Even a simple "yes," although on a cold record appearing crystal clear, can be delivered in a manner that conveys doubt. *Witherspoon* requires a reviewing court to independently review the record to ensure that the exclusions were proper, but that review must take into account that the trial judge was in a much better position to evaluate the clarity of a juror's response. *See O'Bryan v. Estelle*, 714 F.2d at 396 (Higginbotham, J., concurring).

The juror's responses in this case were unambiguous acts which were sufficient to make "unmistakably clear" their answers to the *Witherspoon* questions. Potential jurors were asked to stand up if conscientiously opposed to the death penalty and to step forward if either unequivocally opposed to the death penalty or if their views would prevent impartial deliberation of the defendant's guilt. The trial court was able to observe the jurors' responses and demeanor for hesitancy or uncertainty that would have indicated that their responses were not "unmistakably clear." Moreover, defense counsel did not bring to the court's attention any jurors responding to the question who appeared to be equivocating, which further indicates that the voir dire was satisfactory. On the basis of these facts, we cannot find that the non-verbal responses failed to satisfy *Witherspoon*'s "unmistakably clear" standard.

Non-verbal responses and group voir dire are not necessarily the preferred method for voir dire in the *Witherspoon* context. Individual voir dire and verbal responses may very well be less susceptible to error.[9]

7. *See*, e.g., the exchange between the trial judge and Pfeffer in *O'Bryan v. Estelle*, 714 F.2d at 378–81.

8. The panel opinion discussed a line of pre-trial publicity cases in deciding whether individual voir dire is required in the *Witherspoon* context. *McCorquodale v. Balkcom*, 705 F.2d at 1556–1558, 1563–1564. To the extent that these cases are relevant, they fail to support petitioner's position. They commit the method of voir dire examination to the trial court's discretion within the limits of due process, including whether voir dire should be conducted collectively or individually. *United States v. Gerald*, 624 F.2d 1291, 1296 (5th Cir.1980), *cert. denied*, 450 U.S. 920, 101 S.Ct. 1369, 67 L.Ed.2d 348 (1981). The key factors to be examined are whether the court utilized an effective means of eliciting answers, *United States v. Davis*, 583 F.2d 190, 196–7, 198 (5th Cir.1978), whether the crucial questions were asked, *id.* at 197–98, and whether the defendant failed to specifically object to the voir dire method or request individual questioning. *United States v. Gerald*, 624 F.2d at 1297–98. As our earlier discussion makes evident, we find all these factors to be satisfied in this case.

9. Verbal responses do not of course guarantee that an answer will be unmistakably clear. The clarity of a verbal response may turn on the individual's tone or expression. Likewise, certain non-verbal responses may be more susceptible to ambiguity than others. A nod of the

Witherspoon, however, does not require that any one form of voir dire be used or that a juror's philosophical reasons for opposing the death penalty be explored. Instead, it only requires that the method employed and the questions asked evoked non-ambiguous answers that satisfied the *Witherspoon* "unmistakably clear" standard. Applying that principle to this case, we find that the method of voir dire used here satisfied *Witherspoon*'s mandate.

III. *Sufficiency of the Witherspoon Questions*

[5] The petitioner raises two specific challenges to the sufficiency of the *Witherspoon* questions asked at voir dire. His first argument focuses on the language of the question:

> Would you allow your opinion about capital punishment to prevent you from voting for the death penalty in this case, regardless of what the evidence was?

He argues that the inclusion of the phrase "in this case" violates *Witherspoon*'s admonishment that "a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him." 391 U.S. at 522 n. 21, 88 S.Ct. at 1777 n. 21. Defense counsel had objected generally to the question, without specifying this argument as the basis of his objection.

The argument ignores the clear import of the voir dire question. The phrase "in this case" was not intended to refer specifically to the petitioner's case, and a reasonable juror would not have interpreted the phrase as asking him in advance if he "would in fact" vote for the death penalty in the petitioner's case.[10] Rather, the phrase was used in the same sense that the *Witherspoon* court used the phrase "in the case before him" in explaining that venirepersons could be excused only if they would not impose the death penalty "without regard to any evidence that might be developed at the trial of *the case before them* . . ." *Witherspoon v. State of Illinois*, 391 U.S. at 522 n. 21, 88 S.Ct. at 1777 n. 21.

[6] Petitioner next urges that in addition to the two *Witherspoon* questions that were actually posed, a third question should have been asked as to whether a juror could subordinate his views to his oath as a juror to obey the law. Petitioner relies on footnote seven in *Witherspoon* for this proposition:

> It is entirely possible, of course, that even a juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its abolition could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as juror and to obey the law of the state.

391 U.S. at 514 n. 7, 88 S.Ct. at 1773 n. 7. Petitioner would thus have us add a third prong to the two-prong test outlined in footnote twenty-one of *Witherspoon*.

This court has already rejected petitioner's argument on one prior occasion:

> Nowhere in . . . footnote [7], or in any other part of the opinion, does the Court even imply that a trial court must give the instructions suggested by the petitioner, and we decline to so hold.

Spinkellink v. Wainwright, 578 F.2d 582, 593 n. 14 (5th Cir.1978). We adhere to *Spinkellink*'s holding as the proper result in light of *Witherspoon*'s purpose and reasoning. Footnote seven in *Witherspoon* merely explained the rationale behind the opinion, that potential jurors cannot be excluded for their views on the death penalty unless it would prevent them from following their oaths as jurors. This concern is more than adequately covered by the two questions asked in voir dire based upon footnote twenty-one of the *Witherspoon* opinion. The very principle underlying the questions asking jurors whether their views on the

head, for example, is more susceptible to misinterpretation than requiring a person to stand up or step forward.

10. The *Witherspoon* court noted that "The critical question, of course, is not how the phrase is employed in this area or been construed by the courts and commentators. What matters is how they might be understood or misunderstood—by prospective jurors." 391 U.S. at 515 n. 9, 88 S.Ct. at 1773 n. 9.

death penalty would cause them to automatically vote against the death penalty or preclude them from deliberating impartially on the defendant's guilt is to discern whether the jurors would follow their oaths. The petitioner's proposed third question, therefore, is already subsumed under the two questions that were asked.

IV. *Jurors Woodlief and Kidd*

After the group voir dire, the prosecutor conducted individual questioning of the remaining jurors, which resulted in jurors Woodlief and Kidd being excused for cause. Petitioner challenges these excusals on *Witherspoon* grounds.

The excusal of Woodlief was based on the following exchange:

Q: Do you really believe in capital punishment?

A: No.

Q: You don't?

A: No, I don't. It's different being faced, you know, discussing capital punishment and sending someone to the electric chair.

THE COURT: You didn't understand the question that was posed to you a while ago?

THE JUROR: Yes, I did at that time. I thought that under certain situations and possibly to rationalize this to myself, but sitting here and observing, I don't think I could do it, I really don't.

THE COURT: All right, Mr. Ridley. That's grounds for excusal for cause. You may be excused.

MR. RIDLEY: Your honor, may I invoke the same objections as to the others?

THE COURT: Yes. You may be excused.

Focusing on Woodlief's use of the word "think," the petitioner argues that Woodlief's excusal for cause was improper because she did not unequivocally state that she could not impose the death penalty.

[7] A review of a *Witherspoon* excusal necessitates an examination of the "totality of the circumstances of the voir dire" because *Witherspoon* "does not require that the venire person utter a pat phrase . . . ." *Witt v. Wainwright*, 714 F.2d 1069, 1083 (11th Cir.1983). Moreover, the fact that a juror initially stated that he could follow his oath and then later changed his mind does not demonstrate that a *Witherspoon* violation has occurred. It is the juror's ultimate conclusion by which the court judges whether the juror is unequivocally opposed to the death penalty. *See, Williams v. Maggio*, 679 F.2d 381 (5th Cir.1982) (en banc), *cert. denied*, — U.S. —, 103 S.Ct. 3553, 77 L.Ed.2d 1399 (1983); *O'Bryan v. Estelle*, 714 F.2d at 381–82.

[8] Analyzed from the foregoing prospective, we find that too much is made of Woodlief's use of the word "think." Placed within the context of her *entire* voir dire, her response, "I don't think I could do it, *I really don't*" (emphasis supplied), is unambiguous and unequivocal.

Woodlief stated that she had understood the *Witherspoon* questions[11] and proceeded to explain that upon further thought she realized that:

> It's different being faced, you know, discussing capital punishment and sending someone to the electric chair . . . .
>
> I thought that under certain situations and possibly to rationalize this to myself, but sitting here and observing, I don't think I could do it, I really don't.

This narrative evidences an individual who understood the questions asked, reflected upon them, and concluded that she could not impose the death penalty. Her statements, coupled with the trial judge's ability to observe Woodlief's tone of voice and

11. Juror Woodlief, therefore, does not pose the same problems that were addressed by the court in *Granviel v. Estelle*, 655 F.2d 673 (5th Cir.1981), *cert. denied*, 455 U.S. 1003, 1007, 102 S.Ct. 1636, 1644, 71 L.Ed.2d 870, 875 (1982). In *Granviel*, the questions that were posed were ambiguous and the venireperson in answering indicated confusion and lack of understanding. In contrast, the questions here, as noted above, were clear and precisely stated. Woodlief stated that she understood the questions, and her answers indicate that she did indeed understand what was being asked of her.

demeanor for indecisiveness, allows only one reasonable interpretation of Woodlief's repetitive statement, "I don't think I could do it, I really don't": she unequivocally believed that she could not impose the death penalty regardless of the evidence presented.

Woodlief's voir dire, therefore, does not fall within the ambit of those cases holding a juror's response inadequate under *Witherspoon*. In those cases, the juror's response was insufficient either in light of the ambiguity of the questions asked [12] or because the reply itself indicated confusion or ambiguity that was not clarified by the voir dire.[13] In contrast, Woodlief was responding to properly stated *Witherspoon* questions and undertook an explanation that allows us to interpret the meaning of her answer without having to engage in speculation as to what her replies would have been if further questions had been propounded. *Compare, Burns v. Estelle*, 592 F.2d 1297, 1301 (5th Cir.1979), *aff'd* 626 F.2d 396 (en banc).

In retrospect, the trial judge ideally would have repeated the *Witherspoon* questions to Woodlief, but the court's failure to conduct a perfect voir dire does not prevent us from finding that, based upon all the circumstances, Woodlief understood the questions previously asked and had come to an unequivocal decision that she could not impose the death penalty.

[9] We conclude likewise, based upon a review of the totality of the circumstances, that juror Kidd was not improperly excused. Kidd's voir dire consisted of the following:

Q: Do you really believe in capital punishment?

A: To a certain extent.

Q: To a certain extent?

A: Yes, sir.

Q: Do you feel there are cases where under the evidence it would be a right and just verdict?

A: Well, in a way.

Q: Well, when it comes down, like the last lady [Ms. Woodlief] said, from a theoretical point to where a juror would be asked to vote, do you think you could really never vote for the death penalty no matter what the evidence was?

A: No, sir.

Q: You don't think you could?

MR. ENGLAND: If your honor please, I believe it should be excused for cause.

THE COURT: You say you never could vote for it regardless of the circumstances?

THE JUROR: No, sir.

THE COURT: Did you hear the question that was posed to you just a while ago? Did you understand the question?

THE JUROR: No, I did not understand.

THE COURT: You could not under any circumstances vote for the death penalty?

THE JUROR: No.

THE COURT: Is that right, under any circumstances?

THE JUROR: No.

THE COURT: In that case, you may be excused.

MR. RIDLEY: May the same objections be noted?

THE COURT: Yes.

Although Kidd stated that he did not initially understand the questions asked at group voir dire, he was asked four times during individual voir dire if he could vote

12. *See* cases discussed *supra* note 4.

13. For example, in *Boulden v. Holman*, 394 U.S. 478, 483, 89 S.Ct. 1138, 1141, 22 L.Ed.2d 433, several jurors had been excused for simply stating they did not "believe" in capital punishment without stating that they could not themselves impose it. Similarly, in *Hance v. Zant*, 696 F.2d 940, 954–56 (11th Cir.1983), one juror was excused based on replies such as "As I said before, I believe there are circumstances where the death penalty is warranted, I do not believe that I could vote for it." The excused juror was thus giving contradictory answers indicating confusion, but neither the trial court nor counsel clarified the juror's position. Ambiguous or confusing answers are, of course, often due to inadequate *Witherspoon* questions. See, *supra* note 4 & 10.

for the death penalty under any circumstances,[14] and each time he answered "No." Any initial misunderstanding or uncertainty on Kidd's part was thus resolved by the subsequent questions asked of him and the unequivocality of his responses. Furthermore, defense counsel once again entered only a general objection, without requesting that any further questions be asked. Considering Kidd's ultimate conclusion that he could not impose the death penalty under any circumstances, *see Williams v. Maggio*, 679 F.2d at 396; *O'Bryan v. Estelle*, 714 F.2d at 381–82, we conclude that his excusal did not violate *Witherspoon's* standards.

V. *Conclusion*

The district court correctly concluded in denying the writ of habeas corpus that neither the method of voir dire, the questions asked, nor the exclusion of jurors Woodlief and Kidd violated *Witherspoon*. The district court also properly denied the writ as to the five additional contentions that McCorquodale raised in his petition: "(1) That his written statement was improperly admitted because (a) his arrest was unlawful and (b) his statement was involuntary; (2) that the trial court's instruction on intent operated unlawfully to shift the burden of proof from the state to the defendant; (3) that the jury which tried his guilt or innocence was prosecution-prone; (4) that he was erroneously denied a full evidentiary hearing on his claims that the Georgia capital punishment statute is applied in an arbitrary and racially discriminatory fashion; (5) that the district court attorney's remark to the sentencing jury regarding appellate review violated petitioner's due process right to a fundamentally fair trial...." *McCorquodale v. Balkcom*, 705 F.2d at 1555. The panel opinion affirmed the district court's denial of the writ as to these contentions, which we likewise affirm, reinstating those portions of the panel's holding not inconsistent with this opinion.

The district court's denial of the petition for habeas corpus is AFFIRMED.

CLARK, Circuit Judge, with whom HATCHETT, Circuit Judge, joins, dissenting:

Part I: Group Questioning

In *Witherspoon v. Illinois*, 391 U.S. 510, 521, 88 S.Ct. 1770, 1776, 20 L.Ed.2d 776, 784 (1968), the Supreme Court announced the principle that "a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death." To that end, the Court held that a venireperson's opposition to capital punishment will not justify his excusal for cause, unless he "states unambiguously" and thereby renders it "unmistakably clear" that he would "automatically vote against the imposition of capital punishment no matter what the trial might reveal." *Id.* at 515–16, 522, 88 S.Ct. at 1773–74, 1777, 20 L.Ed.2d at 781–82, 785.

As a general matter, unmistakable clarity is no mean feat to obtain in communications between a judge and juror; it requires that the juror understand the questions asked, and that the judge understand the answers given.[1] Such clarity is doubly elusive in the *Witherspoon* context, where the juror must communicate not only his opinion as to whether he opposes capital punishment, but also the strength and nature[2] of that opin-

14. The voir dire of Mr. Kidd demonstrates the problems when questions are posed in the negative. Although examined out of context, Kidd's "no" answers to a negative question arguably might indicate that he actually could impose the death penalty, a review of the entire exchange between the court and Kidd demonstrates that he was actually stating that he could not vote for the death penalty under any circumstances. This conclusion is further evidenced by the fact that neither the trial judge nor counsel indicated that they understood Mr. Kidd to be saying that he could impose the death penalty.

1. Determination of whether a juror should be excused for cause is a mixed question of fact and law and is left to the trial judge. *See Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751, 756 (1961).

2. Whether a juror is capable of setting aside his opinion, thereby preserving his impartiality, would appear to turn upon the strength of his

ion, for "even a juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its abolition could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State." *Witherspoon*, 391 U.S. at 514, 88 S.Ct. at 1773, 20 L.Ed.2d at 781 n. 7.

The central issue here is whether the procedures employed by the trial court elicited sufficient information to make it unmistakably clear to the trial judge that the jurors excused for cause were unable to set aside their opposition to the death penalty. The majority of this court is satisfied that fifteen jurors standing mute in the face of two questions fulfills this requirement and justifies the jurors' exclusion. The objective of the *Witherspoon* inquiry, however, is not to furnish a vehicle for the exclusion of jurors, but on the contrary is to *insure against* the exclusion of qualified objectors to the death penalty. This was made clear in *Adams v. Texas:*

> As an initial matter, it is clear beyond peradventure that *Witherspoon* is not a ground for challenging any prospective juror. It is rather a limitation on the state's power to exclude; if prospective jurors are barred from jury service because of their views about capital punishment on "any broader basis" than inability to follow the law or abide by their oaths, the death penalty cannot be carried out.

Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). I cannot agree with the majority opinion, because it authorizes the exclusion of prospective jurors from jury service on a broader basis than permitted by *Adams v. Texas* and *Witherspoon*.

In this case, nineteen jurors indicated that they were conscientiously opposed to capital punishment; the nineteen were then addressed en masse by the district attorney,[1] who requested that those venirepersons, whose opposition to capital punishment would prevent them from being impartial as to guilt or from voting for the death penalty regardless of the evidence, step forward. The fifteen who did were excused for cause over objection and without further questions. In assessing whether those fifteen jurors were properly excused, it is "the duty of the Court of Appeals to independently evaluate the *voir dire* testimony of the impaneled jurors." *Irvin v. Dowd*, 366 U.S. 717, 723, 81 S.Ct. 1639, 1643, 6 L.Ed.2d 751, 756 (1961).

The first matter that must be considered in light of the trial procedures employed is whether the jurors may have misunderstood the questions asked of them. As *Witherspoon* emphasized, "The critical question, of course, is not how the phrases employed in this area have been construed by courts and commentators. What matters is how they might be understood—or misunderstood—by prospective jurors." 391 U.S. at 515–16, 88 S.Ct. at 1773–74, 20 L.Ed.2d at 781–82 n. 9 (1968). The majority here concludes that the questions "were clearly stated to the jurors and were not susceptible to misunderstanding." Such a conclusion is directly contradicted by the testimony of venirepersons Kidd and Woodlief, quoted by the majority later in the opinion. Kidd and Wood-

opinion. Chief Justice Marshall, in the *Aaron Burr* case, observed that:

> [L]ight impressions which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony, and resist its force, do constitute a sufficient objection to him.
>
> . . . The question must always depend on the strength and nature of the opinion which has been formed.

United States v. Burr, 25 Fed.Cas. 49, 51 (1807).

1. Georgia law provides that the "usual voir dire questions," which include inquiries concerning the jurors' attitudes toward capital punishment, be "put by the court." O.C.G.A. 15-12-133, 164; *Jordan v. State*, 247 Ga. 328, 276 S.E.2d 224 (1981). The court may, however, delegate that responsibility to the district attorney. *Hicks v. State*, 232 Ga. 393, 207 S.E.2d 30 (1974).

lief did not indicate, when questioned en masse along with the rest of the venire, that they would be unable to vote for the death penalty regardless of the evidence. They and the other remaining jurors were then questioned individually:

> The Court: You say you never could vote for it regardless of the circumstances?
>
> Juror Kidd: No, Sir.
>
> The Court: Did you hear the question that was posed to you just awhile ago? Did you understand the question?
>
> Juror Kidd: *No, I did not understand.*
>
> • • • • • •
>
> Q. Do you really believe in capital punishment?
>
> Juror Woodlief: No.
>
> • • • • • •
>
> The Court: You didn't understand the question that was posed to you awhile ago?
>
> Juror Woodlief: *Yes, I did at that time. I thought that under certain situations and possibly to rationalize this to myself, but sitting here and observing, I don't think I could do it, I really don't.*

Jurors Kidd and Woodlief either did not understand or come fully to terms with the *Witherspoon* questions when posed to the jurors en masse. Kidd and Woodlief resolved their confusion in favor of not stepping forward and were excused after individual questioning. But what of those venirepersons who may have been equally confused but nevertheless who stepped forward? They were dismissed without further interrogation; consequently, there is no way of telling how many of such persons there were, or from among such persons how many ought not to have been excused under *Witherspoon*.

The majority suggests first that members of the venire were free to ask for clarification if they did not understand the questions posed to them en masse. Such an assertion presupposes that jurors have no qualms about standing alongside eighteen of their peers and volunteering information to the effect that they do not know what is going on. To so conclude is to ignore a vast body of research demonstrating the reluctance of individuals to single out their perceptions and attitudes as different from those of the group.[4]

Second, the majority indicates that after the fifteen venirepersons had stepped forward in response to the prosecutor's questions, it was incumbent upon the defense to rehabilitate those jurors through questioning. But Georgia law does not permit such questioning at that stage in the proceedings. O.C.G.A. 15–12–133 provides in part:

> In all criminal cases both the state and the defendant shall have the right to an individual examination of each juror from which the jury is to be selected prior to interposing a challenge. The examination shall be conducted . . . in criminal cases *after the usual voir dire questions have been put by the court.*

(emphasis added). The "usual voir dire questions" refers to those questions enumerated in O.C.G.A. 15–12–164 (*Jordan v. State*, 247 Ga. 328, 276 S.E.2d 224, 234 (1981)), which provides:

> (a) On voir dire examination in a felony trial, the jurors shall be asked the following questions:
>
> • • • • • •
>
> (4) "Are you conscientiously opposed to capital punishment?" If the juror answers this question in the negative, he shall be held to be a competent juror.
>
> • • • • • •
>
> (c) If a juror answers any of the questions set out in subsection (a) of this Code section so as to render him incompetent or *if he is found to be so by the judge, he shall be set aside for cause.*

(emphasis added). Thus, McCorquodale's opportunity to question prospective jurors individually did not begin until *after* the trial court had put the statutory voir dire questions to the jury as a panel, including

4. *See* D. Suggs, B. Sales, "Juror Self-Disclosure in the Voir Dire: A Social Science Analysis," 56 Ind.L.J. 245, 260 (1981); National Jury Project, *Jurywork* (2d ed.) 2–7 (1983).

question (4) pertaining to attitudes toward capital punishment, and *after* the judge had excused those jurors found to be incompetent in light of their answers to those questions. *Arnold v. State*, 236 Ga. 534, 224 S.E.2d 386, 390 (1976).[5]

Third, the majority insists that the *Witherspoon* questions were worded so strongly and clearly that they would evoke an affirmative answer only from jurors whose beliefs were unequivocal. This, of course, presumes that the questions could not have been misunderstood, which, as noted earlier, is not the case. That the questions asked seem clear enough to a lawyer or judge well versed in the *Witherspoon* issue, does not necessarily make them so to the average juror. It is likely that the average veniremember will have formed an opinion as to whether he is philosophically in favor of or opposed to capital punishment, and to the extent he has an opinion, he probably knows whether it is relatively strong or weak. Yet until the moment the question is asked, what cause would an ordinary juror have to consider whether he can set his opinion aside? It is improbable that a lay person will have had prior occasion to undertake the novel mental exercise of pitting the strength of his opposition to capital punishment against his desire to obey the law and abide by his oath as a juror.

5. The record reflects that the trial judge suggested that "we start off with 60" and then "the voir dire oath was administered to all panels by the District Attorney." (R. 1201-2). With this large group in the courtroom, the District Attorney undertook the interrogation of the entire group by asking questions required by O.C.G.A. § 15-12-164—"Questions on voir dire; setting aside juror for cause." Some jurors were excused for possible bias because of knowledge about the case. Then the District Attorney asked the *Witherspoon* questions which are the subject of this dispute.

On the basis of their responses to the *Witherspoon* inquiry and the other statutory voir dire questions, the trial court, pursuant to § 15-12-164(c), excused those jurors deemed incompetent. Fifteen jurors were so excused. The remaining jurors were then "put upon the accused" as directed by § 15-12-161, at which time, the right to individual examination commenced pursuant to O.C.G.A. § 15-12-133, which by its terms takes effect "after the usual voir dire questions have been put by the court." The balance of the panel was then questioned a second time, and additional jurors were excused for cause after both parties had had the opportunity to question them individually. Veniremembers Kidd and Woodlief were excused at this time.

The majority cites several cases in support of its observation that Georgia defense counsel frequently participate in the *Witherspoon* questioning of jurors. *Mincey v. State*, 251 Ga. 255, 304 S.E.2d 882, 889-90 (1983); *Castell v. State*, 250 Ga. 778, 301 S.E.2d 234, 244-46 (1983); *Allen v. State*, 248 Ga. 678, 286 S.E.2d 3 (1982); *Coffield v. State*, 247 Ga. 98, 274 S.E.2d 530, 535-36 (1981). There is no doubt that defense counsel do so participate; § 133 entitles them to. The question is when. None of the cases cited implicates a right of defense counsel to participate at the time the veniremembers are questioned by the court en masse, prior to their being called to the stand individually; indeed, there is no indication in any of those cases that the panel was ever addressed en masse, or if it was, whether defense counsel were permitted to question the panel at that time.

To the extent the trial court forgoes assembly of the panel en masse, as appears to have been done in the cases cited by the majority, and instead waits until the veniremembers are called to the stand one at a time to ask them the statutory voir dire questions, it follows that the defendant's right to question the jurors individually commences as soon as the statutory questions are asked by the court. But in McCorquodale's case, the process was bifurcated: the statutory voir dire questions were posed to the panel en masse in phase I, with individual questioning to follow in phase II. Insofar as the statute entitles counsel to question the jurors individually only after the statutory voir dire questions have been asked, that right necessarily did not begin until after the first phase was completed, and after fifteen jurors were excused.

Objection to group questioning was made in *Arnold*, *supra*, a Fulton County case where the procedure was identical. There the jurors were asked the same questions and responded by raising their hands. Six were excused for cause over the objections of the defense. The Supreme Court said at 224 S.E.2d 390: "The defendant also contends that the statutory voir dire questions cannot be put to jurors as a group over objection. Code Ann. § 59-806 [now O.C.G.A. § 15-12-164]. We disagree." While going on to cite Ga.Code Ann. § 59-705 [now O.C.G.A. § 15-12-133], noting that this fact gives defense counsel the right to examine jurors individually, the court points out that this is "... after the usual voir dire questions had been put by the court." There is no procedure in Georgia as examinations are conducted in Fulton County for the individual questioning to commence until after the trial court has excused the veniremen for cause.

Consequently, the question is a unique one for the juror, though not for the judge. It is thus incumbent upon the judge to see to it that the juror understands the question, and that the juror's opposition to the death penalty is indeed sufficiently strong to justify exclusion under *Witherspoon*. The trial court offered no such assistance in this case. The jurors' silence was presumed tantamount to understanding, and the strength of their opinions was presumed sufficient by their stepping forward.

Quite apart from whether the jurors understood the questions asked and responded as honestly as possible, is the question of whether the judge understood the jurors' answers. A juror's inability to set aside his opposition to capital punishment in reaching a verdict as to guilt or innocence must be stated unambiguously in order for his exclusion to be justified; equivocal responses are insufficient. *Maxwell v. Bishop*, 398 U.S. 262, 264–65, 90 S.Ct. 1578, 1580, 26 L.Ed.2d 221, 224 (1970). If a juror presented with the question of whether his opposition to capital punishment will prevent him from rendering an impartial verdict responds that he thinks so but is not sure, the judge should have little trouble in understanding that the juror is equivocating and that further questioning is necessary to render the juror's position unmistakably clear.[6] But how is equivocation or ambiguity to be detected when jurors respond nonverbally and en masse?

The majority supposes that "[t]he trial court was able to observe the juror's responses and demeanor for hesitancy or uncertainty that would have indicated that their responses were not 'unmistakably clear'." There is no denying that uncertainty or hesitation may be communicated nonverbally, and that a judge no less than anyone else may be able to detect and comprehend such communication. Nonverbal communication, however, unlike verbal communication, is transmitted by any of several means: facial expression, hand gestures, eye movement, posture and body movement, to name but a few. R. Baron, D. Byrne, *Social Psychology* 45–56 (1979). It is unreasonable and contrary to common sense to expect that a trial judge would be able to attend to and assimilate the many nonverbal indicia of hesitation or equivocation manifested by any single venireperson, let alone nineteen, when all are responding at the same time. This conclusion is bolstered by studies in the field of cognitive psychology demonstrating the markedly diminished capacity of human beings to assimilate an isolated stimulus or piece of information when multiple stimuli are received simultaneously. A. Reynolds, P. Flagg, *Cognitive Psychology* 28–29 (1983); E. Carterette, M. Friedman (Ed's), *Handbook of Perception* Vol. IX "Perceptual Processing" 3–7 (1978).

It is true that a trial judge is in a position to observe the demeanor of jurors, and thus has an advantage over an appellate court, which has only a record to read. Nevertheless, even a trial judge cannot implement the strictures of the *Witherspoon* tests under the circumstances presented here. It is inconceivable that a trial court, utilizing a procedure whereby nineteen venirepersons answer two short questions nonverbally and en masse, can independently evaluate and adjudicate each of the juror's qualifications as required by *Witherspoon* and its progeny. Instead, the jurors themselves were permitted to make the decision as to whether they should be excluded from jury service by the mere expedient of stepping for-

6. In *Douglas v. Wainwright*, a venireperson who was asked if she could return a truthful verdict regardless of her opposition to the death penalty, initially responded: "I don't know; I just don't believe in capital punishment." 521 F.Supp. 780, 780 (M.D.Fla.1981). The district court, on habeas review, observed:

> Although the trial judge was again conducting the proper inquiry under *Witherspoon*, in that he was asking specifically whether her opposition to capital punishment would interfere with her "bringing in a truthful verdict touching upon guilt or innocence", this venireperson initially did not respond in the unequivocal fashion that would, at that point, permit her exclusion for cause. Indeed, without further questioning, this would appear akin to the situation in *Maxwell v. Bishop*

Id. at 800.

ward. *Witherspoon* requires unambiguous and unmistakably clear communication between jury and judge; any semblance of such clarity was lacking in this case, consequently rendering the brief en masse, nonverbal interrogation constitutionally inadequate.

Part II: Individual Questioning

Sylvia Woodlief's Interrogation

Witherspoon and *Adams* require unequivocal answers by prospective jurors to questions propounded to them before they may be excluded by the state from the venire panel for cause. This is conceded in the majority opinion (at 1500–1501), which nevertheless concludes that the statement "I don't think I could do it, I really don't," is unequivocal.

Woodlief's individual *voir dire*[7] never established that she would automatically vote against the imposition of the death penalty, or that her convictions would preclude her from fairly deciding the question of guilt or innocence, or that she would not be able to adhere to her oath as a juror and apply the applicable law. Since she was not asked the questions to elicit this information, the majority reasons that the questions were not ambiguous. The district attorney had asked her if she would be fair and impartial and "go by the evidence and the law" to which she replied in the affirmative. He then asked her if she "really" believed in capital punishment, and she said she did not. She then added that, "It's different being faced, you know, discussing capital punishment and sending someone to the electric chair." The trial court then interrupted and asked her whether she understood "the question that was posed to you awhile ago," to which Woodlief replied in the affirmative. She then volunteered that she "thought that under certain situations and possibly to rationalize this to myself, but sitting here and observing, I don't think I could do it, I really don't." She was then immediately excused by the court over objection of defendant's counsel.

This individual voir dire examination demonstrates that the state of Georgia did not satisfy *Witherspoon*'s stringent test. A state is permitted to:

> execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*.

Witherspoon, 391 U.S. at 522, 88 S.Ct. at 1777, 20 L.Ed.2d at 785 n. 21 (emphasis in original).

7. THE CLERK: Miss Sylvia R. Woodlief.
THE JUROR: 200 28th Street, and I'm a salesgirl for Gillette.
BY MR. ENGLAND:
Q Miss Woodlief, you say you're what?
A I'm a sales representative for Gillette.
Q The razor blade company?
A Yes.
Q Have you served before on a jury in a criminal case this week?
A This week.
Q Do you recognize anyone at the other table?
A No.
Q Would you be fair and impartial in this case, go by the evidence and the law, let your verdict speak the truth on that basis?
A Yes.
Q Do you really believe in capital punishment?
A No.
Q You don't?
A No, I don't. It's different being faced, you know, discussing capital punishment and sending someone to the electric chair.
THE COURT: You didn't understand the question that was posed to you awhile ago?
THE JUROR: Yes, I did at that time. I thought that under certain situations and possibly to rationalize this to myself, but sitting here and observing, I don't think I could do it, I really don't.
THE COURT: All right, Mr. Ridley. That's grounds for excusal for cause.
You may be excused.
MR. RIDLEY: Your Honor, may I invoke the same objections as to the others?
THE COURT: Yes.
You may be excused.
R. at 400–01.

The leading case in this circuit[5] is *Burns v. Estelle*, 592 F.2d 1297 (5th Cir.1979), adhered to en banc 626 F.2d 396 (5th Cir.1980). The Fifth Circuit en banc decision was withheld until the Supreme Court decided *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). The panel and the Supreme Court had under consideration § 12.31(b) of the Texas Penal Code which provided that a juror could not serve "unless he states under oath that the mandatory period of death or imprisonment for life will not affect his deliberations on any issue of fact." The panel described the examination of four members of the *Burns* venire panel—Doss, Mann, Tillman, and Mitchell—as follows:

> [E]ach said at least once that the mandatory death penalty would affect his or her deliberations on issues of fact. Mrs. Doss testified that she did not believe in the death penalty; Mrs. Mann testified that she had thought about the death penalty a lot and was against it, and in no circumstances could she give it. Mr. Tillman acknowledged additionally that he could not sit and decide this case due to the existence of the penalty, that it would be "real hard" to sit and listen objectively to the issues, and that he could not do it. Mrs. Mitchell commenced by saying that she did not think the mandatory sentence would affect her deliberations on the facts, but she later said it probably would affect her decision or deliberations and finally stated that she was sure her deliberations on issues of fact would be affected. . . .

Burns v. Estelle, 592 F.2d 1297, 1300 (5th Cir.1979).

In holding that these types of statements were not sufficient to disqualify a juror, the *Burns* panel stated:

> Only the most extreme and compelling prejudice against the death penalty, perhaps only or very nearly a resolve to vote against it blindly and in all circumstances, is cause to exclude a juror on *Witherspoon* grounds. A mere disbelief in it, or even "conscientious or religious scruples against its infliction" will not suffice, since many people hold such views and some of these may yet be able to overcome them and abide by the law.

Burns, 592 F.2d at 1300 (footnote omitted).

In *Granviel v. Estelle*, 655 F.2d 673 (5th Cir.1981), a panel followed the *Burns* and *Adams* holdings and declared that the following did not meet the *Witherspoon* test:

> Of the five veniremen whose exclusion Granviel challenges, the district court held, in accordance with the magistrate's recommendation, that one venireman, Donald L. Harrison, was improperly excused for cause for merely voicing conscientious scruples against the death penalty. We, too, believe that Harrison's exclusion for cause constituted a *Witherspoon* violation. He was first asked whether he had conscientious scruples against the infliction of the death penalty, whereupon he stated, "I don't know what that means." When asked if he could ever vote to inflict the death penalty, he replied, "No, I don't *think* I could." Then, in response to the question, "You just don't *feel* like you would be entitled to take another person's life in that fashion?" He nodded and then said, "No, I could not." These questions and answers fall far short of an affirmation by Harrison that he would automatically vote against the death penalty regardless of the evidence, or that his objections to capital punishment would prevent him from making an impartial decision as to guilt.

Granviel, 655 F.2d at 677 (footnotes omitted; emphasis in the original). Sylvia Woodlief's answers are no different from those of Donald L. Harrison.

The *Hance v. Zant* panel followed *Adams*, *Burns*, and *Granviel*, holding that the following answers did not satisfy the *Witherspoon* test:

6. In *Bonner v. Prichard*, 661 F.2d 1206 (11th Cir.1981), the Eleventh Circuit adopted as precedent decisions of the Fifth Circuit.

MRS. MELTON: As I said before, I believe there are circumstances where the death penalty is warranted. I do not believe that I could vote for it.

* * * * * *

MS. TURPIN: Well, I don't know. I just say that I don't think I could.[9]

Hance v. *Zant*, 696 F.2d 940, 955 (11th Cir. 1983).

A panel of this court this year has said the following with respect to the *Witherspoon* test:

> The Court, in explaining this test, has indicated a prospective juror must be permitted great leeway in expressing opposition to the death penalty before he or she qualifies for dismissal for cause. A prospective juror may even concede that his or her feelings about the death penalty would possibly color an objective determination of the facts of a case without admitting of the necessary partiality to justify excusal. The Court has stated:
>
> > Nor [does] the Constitution permit the exclusion of jurors from the penalty phase of a ... murder trial if they aver that they will honestly find the facts and answer the questions in the affirmative if they are convinced, beyond reasonable doubt, but not otherwise, *yet who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be reasonable doubt.* Such assessments and judgments by jurors are inherent in the jury system, and to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled under the law.
>
> *Adams*, 448 U.S. at 50, 100 S.Ct. at 2529 (emphasis added).

Witt v. *Wainwright*, 714 F.2d 1069, 1081 (11th Cir.1983). *Witt* found the following voir dire improper:

> Mr. Plowman [for the State]: Now, let me ask you a question, ma'am. Do you have any religious beliefs or personal beliefs against the death penalty?
>
> Ms. Colby: I am afraid personally but not—
>
> Mr. Plowman: Speak up, please.
>
> Ms. Colby: I am afraid of being a little personal, but definitely not religious.

9. PROSECUTOR: No matter what the facts or circumstances of this case might be, you do not believe that you could follow the instructions of the Court to consider the death penalty and vote to impose it, is that right?
MRS. MELTON: No, sir, as I said before, I feel there are times when the death penalty is warranted. I do not believe that I with my conscience could vote to impose the death penalty.
PROSECUTOR: No matter what the facts or circumstances of the case might be?
MRS. MELTON: In some cases I might.
Before excusing her for cause, the judge asked a final question.
THE COURT: Let me just ask her my question too, then, are you so conscientiously opposed to capital punishment that you would not vote for the death penalty under any circumstances?
MRS. MELTON: As I said before, I believe there are circumstances where the death penalty is warranted. I do not believe that I could vote for it.
COUNSEL: If you thought from the facts you heard in the whole case that that was the proper decision to make, that he should be electrocuted, could you vote that that was what you thought should be done?
MS. TURPIN: Well, this is hard. I don't know. I'm just too confused. I don't know.
* * * * * *
THE COURT: Well, what we want to find out is if he should be found guilty, after you've heard all the circumstances about this case, do you think that there is any way that you could vote to have him executed, that is, to find for the death penalty?
MS. TURPIN: Well, I guess I could.
* * * * * *
THE COURT: Well, that's what we need to find out whether or not you could vote for death if the circumstances of the trial, after you've learned all about it, whether or not you could, not that you would, whether you could vote to impose the death penalty?
MS. TURPIN: Well, I don't know. I just say that I don't think I could.
THE COURT: You don't think you could? I believe the juror should be excused for cause....
Hance v. *Zant*, 696 F.2d at 955.

Mr. Plowman: Now, would that interfere with you sitting as a juror in this case?

Ms. Colby: I am afraid it would.

Mr. Plowman: You are afraid it would?

Ms. Colby: Yes, sir.

Mr. Plowman: Would it interfere with judging the guilt or innocence of the defendant in this case?

Ms. Colby: I think so.

Mr. Plowman: You think it would?

Ms. Colby: I think it would.

Mr. Plowman: Your Honor, I would move for cause at this point.

THE COURT: All right. Step down.

Prospective juror Colby's responses are limited to expressions of her feelings and her thoughts on the subject of inflicting the death penalty. At no point did she unequivocally state that she would automatically be unable to apply the death penalty or to find petitioner guilty if the facts so indicated. Her statements fall far short of the certainty required by *Witherspoon* to justify for cause excusal. Perhaps her responses are so devoid of the necessary certainty because of the State's failure to frame its questions in an appropriately unambiguous manner. *Witt*, 714 F.2d at 1082. The majority opinion does not purport to overrule *Burns*, *Granviel*, *Hance*, or *Witt*, *supra*, since those cases properly interpret the *Witherspoon-Adams* test. Given our requirement to follow the Supreme Court opinions, the majority opinion is inexplicable.[10]

Allen L. Kidd's Interrogation

A review of the examination of juror Allen Kidd reveals that he too was improperly excused under the *Witherspoon-Adams* test.[11] The majority opinion holds that Kidd made it unmistakably clear that he was opposed to the death penalty and that he was unable to set aside such opposition and follow the law and the evidence and

10. *See Maxwell v. Bishop*, 398 U.S. 262, 264, 90 S.Ct. 1578, 1580, 26 L.Ed.2d 221, 224 (1970) (improper excusal based upon answers of "I think I do" and "I'm afraid I do"); *Segura v. Patterson*, 403 U.S. 946, 91 S.Ct. 2280, 29 L.Ed.2d 856, *rev'g* 402 F.2d 249 (10th Cir.1971) ("I don't think I can bring in the death penalty"); *Funicello v. New Jersey*, 403 U.S. 948, 91 S.Ct. 2278, 29 L.Ed.2d 859, *rev'g* 52 N.J. 263, 245 A.2d 181 (1968) ("I don't think I could ...").

11. All right now, call us another one.

THE CLERK: Allen L. Kidd.

THE JUROR: 3300 Sewell Road. I work for the Powell View Company.

BY MR. ENGLAND:

Q Mr. Kidd, I couldn't tell where you worked.

A Powell View Company.

Q A nursing home?

A Yes.

Q Have you served before in a criminal case?

A No.

Q Do you recognize anybody at the other table?

A No.

Q Would you be a fair and impartial juror in this case and just let your verdict speak the truth based on the evidence that comes out in court and the law that his Honor gives you?

A Yes.

Q Do you really believe in capital punishment?

A To a certain extent.

Q To a certain extent?

A Yes, sir.

Q Do you feel there are cases where under the evidence it would be a right and just verdict?

A Well, in a way.

Q Well, when it comes down, like the last lady said, from a theoretical point to where a juror would be asked to vote, do you think you could really never vote for the death penalty no matter what the evidence was?

A No, sir.

Q You don't think you could?

MR. ENGLAND: If your Honor please, I believe it should be executed for cause.

THE COURT: You say you never could vote for it regardless of the circumstances?

THE JUROR: No, sir.

THE COURT: Did you hear the question that was posed to you just awhile ago? Did you understand the question?

THE JUROR: No, I did not understand.

THE COURT: You could not under any circumstances vote for the death penalty?

THE JUROR: No.

THE COURT: Is that right, under any circumstances?

THE JUROR: No.

THE COURT: In that case, you may be excused.

MR. RIDLEY: May the same objection be noted?

THE COURT: Yes.

R. at 401-04.

return a verdict for the death penalty. Instead, a review of the complete interrogation reflects a morass of ambiguities. First, Kidd states that he could be a fair and impartial juror and that his verdict would speak the truth based on the evidence and the law presented. He then states that to a certain extent he believes in capital punishment. He further states that "in a way" he feels that there are cases where the death penalty would be a right and just verdict. To that point, Mr. Kidd is making it clear that he is a juror who could be eligible to sit on the jury even though he might have some doubts about a death penalty in some cases.

The district attorney then asked "do you think you could really never vote for the death penalty no matter what the evidence was," to which Kidd answers "no." The majority opinion reads the answer to that question to be "yes" instead of "no." After that answer, the district attorney moved the court to excuse Mr. Kidd for cause. The court asked Mr. Kidd the same question and got the same no answer, which reflects that Mr. Kidd *could* vote for the death penalty. The court then asked the juror if he heard "the question that was posed to you just awhile ago" and did you understand the question, to which the juror said, "No, I did not understand." The court then asked, "You could not under any circumstances vote for the death penalty," to which the juror answers "no" and again "no" when the court asks, "Is that right, under any circumstances?" The majority opinion reasons: "Any initial misunderstanding or uncertainty on Kidd's part was thus resolved by the subsequent questions asked of him and the unequivocality of his responses." (at 1502). An ambiguous question with a double negative that elicits a meaningless response cannot be the basis of unequivocality.

Conclusion

The writ should be granted conditionally in this case for a retrial of the sentencing issue. The *Witherspoon* Court had before it the issue of whether a state could challenge for cause any prospective jurors who held conscientious objections about the death penalty. *Witherspoon* held that a state could remove such a juror, but only after the juror is interrogated and (1) it is established that the juror understood the phrases and words used in the interrogation; and (2) the juror makes it unmistakably clear, by means of unambiguous responses, that he would be unable to set aside his conscientious opposition to the death penalty and abide by his oath as a juror.

The test established in *Witherspoon* is rigorous. It places upon the state the burden of showing that a juror is not qualified before exclusion for cause can be justified, and it requires that the trial court carefully weigh the views of each conscientious objector in determining whether the state has met its burden. These requirements were not satisfied here with regard to the fifteen jurors questioned as a group, or as to jurors Woodlief and Kidd.

Group questioning is not condemned in all cases, but where a defendant's constitutional right to have a balanced jury is at stake, there is no excuse for a cursory, preemptive examination that does not permit the full sifting of jurors' views. The holding that jurors Woodlief and Kidd were unqualified and properly excluded flies in the face of precedent in the Supreme Court and our circuit. McCorquodale is entitled to a sentencing hearing before a new, properly qualified petit jury.

GODBOLD, Chief Judge, with whom JOHNSON, Circuit Judge, joins, dissenting:

I respectfully dissent, and I concur in Part II of the dissenting opinion filed by Judge Clark.

filed petition for writ of habeas corpus. The United States District Court for the Northern District of Georgia, at Atlanta, Orinda D. Evans, J., 525 F.Supp. 408, denied the petition, and an appeal was taken. The Court of Appeals, Clark, Circuit Judge, held that: (1) jurors, who were questioned as a group regarding their opposition to capital punishment, were prematurely excused, as the requirement that it be made unmistakably clear that the jurors would automatically vote against imposition of capital punishment without regard to any evidence that might be developed at the trial was not met, and (2) trial court must determine that prospective jurors in a capital case understand the difficult distinction between possessing a personal opinion regarding capital punishment and the ability to subordinate that view in order to perform his or her duty as a juror, and in order to ascertain that a juror understands this distinction, the trial court must require a thorough and informative questioning of each juror.

Affirmed in part, reversed in part, and remanded.

Kravitch, Circuit Judge, concurred in part and dissented in part, with opinion.

1. Criminal Law ⇐412.1(1)

Defendant's written statement was properly admitted since his arrest was lawful and his statement voluntary; he was taken to police station for questioning pursuant to information obtained from two reliable informants, and the totality of the circumstances indicated no abusive or excessive questioning, nor mental impairment on his part.

2. Homicide ⇐269

Defendant's insistent assertions of guilt effectively withdrew the issue of intent to commit murder from the jury.

3. Jury ⇐33(2.1)

Exclusion of jurors unalterably opposed to the death penalty did not result in the

Timothy Wesley McCORQUODALE, Petitioner-Appellant,

v.

Charles BALKCOM, Warden, Georgia State Prison, et al., Respondents-Appellees.

No. 82-8011.

United States Court of Appeals, Eleventh Circuit.

May 31, 1983.

As Amended June 10, 1983.

A state prisoner, who was convicted of first-degree murder and sentenced to death,

creation of an unconstitutionally guilt-prone jury.

4. Habeas Corpus ⇐50

In view of the incompleteness of the statistics proffered by petitioner, the district court correctly refused to conduct further evidentiary hearings on his claim that the Georgia capital punishment statute was applied in an arbitrary and racially discriminatory fashion.

5. Criminal Law ⇐1171.1(3)

Prosecutor's improper remark to the sentencing jury regarding appellate review was not sufficiently prejudicial, in the context of the entire trial, as to render the trial fundamentally unfair.

6. Criminal Law ⇐1144.8, 1158(3)

Appellate courts do not lightly interfere with the jury selection process and trial judges are accorded great deference in such area; however, on an issue as vital to its jurisprudence as *Witherspoon*, the Court of Appeals is not precluded from scrutinizing the record in an effort to ascertain the correctness of the trial court's finding regarding the veniremen's convictions on capital punishment.

7. Jury ⇐186

Jurors, who were questioned as a group regarding their opposition to capital punishment, were prematurely excused, as the requirement that it be made unmistakably clear that the jurors would automatically vote against imposition of capital punishment without regard to any evidence that might be developed at the trial was not met; none of the jurors were given an opportunity to demonstrate a willingness to consider all of the penalties provided by state law, or an opportunity to demonstrate an absence of any irrevocable commitment, before the trial began, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings.

8. Jury ⇐131(8)

Trial court must determine that prospective jurors in a capital case understand the difficult distinction between possessing a personal opinion regarding capital punishment and the ability to subordinate that view in order to perform his or her duty as a juror, and in order to ascertain that a juror understands this distinction, trial court must require a thorough and informative questioning of each juror.

9. Jury ⇐131(17)

Although one prospective juror, who stated that he did not think he could vote for the death penalty under any circumstances and who three times stated unequivocally his inability to vote for the death penalty, was correctly excused under the *Witherspoon* rule, the questioning of another prospective juror, who was also excused, was insufficient in that she simply stated she did not "think" she could vote for the death penalty and was then excused without further questioning, no mention being made of an automatic vote or whether she could lay aside her personal view.

John R. Myer, Atlanta, Ga., John Charles Boger, Anthony Amsterdam, New York City, for petitioner-appellant.

H. Allen Moye, Janice G. Hildenbrand, Asst. Atty. Gen., Atlanta, Ga., for respondents-appellees.

Appeal from the United States District Court for the Northern District of Georgia.

Before KRAVITCH, HATCHETT, and CLARK, Circuit Judges.

CLARK, Circuit Judge:

Timothy Wesley McCorquodale was tried and convicted of first-degree murder by a jury in the Superior Court of Fulton County, Georgia.[1] The judge, acting upon the

1. The facts have been summarized in the published opinion of the Georgia Supreme Court, *McCorquodale v. State*, 233 Ga. 389, 211 S.E.2d 377 (1974). We therefore deem it sufficient to emphasize the Georgia court's conclusion that, "In no case we have reviewed has the depravity of the defendant and the torture of the victim exceeded that established by the evidence and testimony of the witnesses in this case." We recite only such additional facts as are

jury's recommendation of the death penalty, sentenced appellant to death. On direct appeal, the Georgia Supreme Court affirmed the conviction and sentence. *McCorquodale v. State*, 233 Ga. 369, 211 S.E.2d 577 (1974), *cert. denied*, 428 U.S. 910, 96 S.Ct. 3223, 49 L.Ed.2d 1218 (1976). Subsequently, a petition for writ of habeas corpus was filed in state court, and the same was denied, *McCorquodale v. Stynchcombe*, 239 Ga. 138, 236 S.E.2d 486, *cert. denied*, 434 U.S. 975, 98 S.Ct. 534, 54 L.Ed.2d 467 (1977). Appellant also sought unsuccessfully to obtain a new trial by extraordinary motion, *McCorquodale v. State*, 242 Ga. 507, 249 S.E.2d 211 (1978). McCorquodale then sought habeas corpus relief in the federal courts by filing a petition for the writ in the United States District Court for the Northern District of Georgia, attacking both his conviction and death sentence, *McCorquodale v. Balkcom*, 525 F.Supp. 408 (N.D.Ga.1981). Appellant appeals the district court's denial of his habeas corpus petition.

In his petition, McCorquodale contends (1) that his written statement was improperly admitted because (a) his arrest was unlawful and (b) his statement was involuntary; (2) that the trial court's instruction on intent operated unlawfully to shift the burden of proof from the state to the defendant; (3) that the jury which tried his guilt or innocence was prosecution-prone; (4) that he was erroneously denied a full evidentiary hearing on his claims that the Georgia capital punishment statute is applied in an arbitrary and racially discriminatory fashion; (5) that the district attorney's remark to the sentencing jury regarding appellate review violated petitioner's due process right to a fundamentally fair trial; and (6) that he was denied a fair and impartial sentencing jury in violation of the sixth and fourteenth amendments, pursuant to the interpretations given by the Supreme Court in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), and its progeny. We address each issue seriatim.

[1] Petitioner first contends that the improper admission of his statement mandates the reversal of his conviction. The trial court conducted a suppression hearing on this issue. A review of that proceeding and the record as a whole leads us to affirm the district court and deny petitioner's requested relief. No unlawful arrest occurred. Pursuant to information obtained from two reliable informants, McCorquodale was taken to the police station for questioning. *See generally Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975); *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). Neither was his statement involuntary.[2] The totality of the circumstances indicate no abusive or excessive questioning, no mental impairment on the part of the defendant. *See generally Jurek v. Estelle*, 623 F.2d 929 (5th Cir.1980) (en banc).

[2] Petitioner's second contention also attacks his conviction. In *Connecticut v. Johnson*, — U.S. —, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983), the Supreme Court addressed the burden-shifting instruction on intent[3] and whether such an error can be harmless. Although a plurality opinion, *Johnson* states that "a defendant may in some cases admit that the act alleged by the prosecution was intentional, thereby sufficiently reducing the likelihood that the jury applied the erroneous instruction as to permit the appellate court to consider the error harmless. We leave it to the lower courts to determine whether, by raising a particular defense or by *his other actions*, a defendant himself has taken the issue of intent away from the jury." *Id.* at —, 103 S.Ct. at 978 (citations and footnotes

relevant to the specific issues raised in this appeal.

2. Although not decisive of the ultimate issue, we note McCorquodale's perception that his statement was voluntary and made in the absence of any threats. Trial Transcript 246.

3. This issue is known as the *Sandstrom* issue. *See Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

omitted) (emphasis added). Under the peculiar circumstances of this case, we find that the defendant's insistent assertions of guilt effectively withdrew the issue of intent from the jury.

During the defense's opening statement, counsel stated to the jury that, "[W]e've been here trying to plead guilty for two days."[4] Trial Transcript 468. He went on to say, "[W]e are guilty. We know it. It's that simple. And I think when you go throughout this trial and throughout this whole hearing you'll never hear any statement from us other than that." Trial Transcript 469. Defense counsel maintained the same position in his closing argument, stating, "Yes, he killed her." Trial Transcript 700. "[H]e's guilty of the crime of murder." Trial Transcript 702. In conclusion, McCorquodale's attorney stated, "Try in your mind to ascertain what you believe happened out there and I think you will find him guilty. Thank you."[5] *Id.* Thus, we refuse to overturn McCorquodale's conviction on the basis of an alleged erroneous instruction of intent.

[3, 4] Also without merit are appellant's third and fourth assertions of error. In *Smith v. Balkcom*, 660 F.2d 573 (5th Cir. Unit B 1981), *modified*, 671 F.2d 858 (5th Cir. Unit B), *cert. denied*, — U.S. —, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982), we rejected the argument that the exclusion of jurors unalterably opposed to the death penalty results in the creation of an unconstitutionally guilt-prone jury. 660 F.2d at 575–79. In *Smith*, we also held that in light of the evidence proffered, no evidentiary hearing was required on the issue of the arbitrary and discriminatory imposition of the Georgia capital punishment statute. 660 F.2d at 584–85, *modified*, 671 F.2d at 859–60. As in *Smith*, the statistics proffered in the instant case are incomplete. The tables do not take into account the various statutory aggravating circumstances such as the "wantonly vile, horrible, [and] inhumane"[6] torture-murder evidenced here. We therefore hold that the district court correctly refused to conduct further evidentiary hearings on petitioner's proffered evidence.

[5] Appellant's fifth contention, that the prosecutor's improper remark to the sentencing jury regarding appellate review[7] required a vacating of petitioner's sentence, is likewise devoid of merit. The trial court gave a curative instruction.[8] *Prevatte v. State*, 233 Ga. 929, 214 S.E.2d 365 (1975). In the context of the entire trial, the remark was not sufficiently prejudicial so as to render the trial fundamentally unfair. *E.g., Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); *Jones v. Estelle*, 622 F.2d 124 (5th Cir.), *cert. denied*, 449 U.S. 996, 101 S.Ct. 537, 66 L.Ed.2d 296 (1980).

[6] Appellant's sixth contention requires that we scrutinize those portions of the record pertaining to jury selection.[9] Near

4. Before voir dire in the instant case, defense counsel tried to enter a plea of guilty and have the court pass sentence. The court rejected the plea. Defense counsel also attempted to waive a jury trial and have the court pass on guilt and sentence. The court refused to allow such a waiver.

5. Defense counsel also attempted to waive a jury at the sentencing stage. The court refused to allow this waiver.

6. Off.Code Ga.Ann. sec. 17-10-30(b)(7) (1982).

7. At the sentencing hearing, the prosecutor made the following remark during closing argument: "But, you have a contribution to make. A vital contribution which you are now considering and will be deliberating on. And after your decision, the Appellate Court will have a very important responsibility." Trial Transcript 706. Counsel for petitioner immediately objected and moved for mistrial. *Id.* The motion was denied. Trial Transcript 709.

8. The court characterized the remark as "highly improper," Trial Transcript 770, and urged the jurors to give it "no consideration whatsoever." Trial Transcript 771.

9. We recognize that appellate courts do not lightly interfere with the jury selection process and that trial judges are accorded great deference in this area. *E.g., United States v. Holman*, 680 F.2d 1340 (11th Cir.1982); *United States v. Hawkins*, 658 F.2d 279 (5th Cir. Unit A 1981). However, as an issue as vital to our jurisprudence as *Witherspoon*, this court is not precluded from scrutinizing the record in an effort to ascertain the correctness of the trial court's finding regarding the veniremen's convictions on capital punishment. In *Aiken v. Washington*, 403 U.S. 946, 91 S.Ct. 2283, 29 L.Ed.2d 856 (1971), the Supreme Court in a

the beginning of the voir dire of approximately 60 jurors, the veniremen were asked collectively whether they were conscientiously opposed to capital punishment and, if so, to stand. Nineteen prospective jurors responded. The district attorney then instructed this group that he intended to ask two additional questions and if the answer to either was affirmative, to step forward. The first question posed was, "Would you allow your opinion about capital punishment to prevent you from voting for the death penalty in this case, regardless of what the evidence was?" The second question was, "Would you allow your opinion about capital punishment to prevent you from being a fair and impartial juror on the issue of guilt or innocence as distinguished from the issue of punishment?" The district attorney then moved the court to excuse for cause the 15 prospective jurors who had stepped forward, and the court granted that motion over defense counsel's objections.[10]

These facts present difficult questions regarding the application of *Witherspoon*. We must determine whether the three questions posed by the district attorney were sufficient under the mandates of *Witherspoon*, particularly in the absence of individual questioning of prospective jurors.[11]

memorandum opinion reversed the death sentence and remanded to the state court based on *Witherspoon*. The state court opinion on review had found no *Witherspoon* violation based in part on deference to the trial judge.

10. Ladies and gentlemen, I want to address to you now, three questions and if your answer to the first question is, yes, will you please stand. If your answer to this question is no, will you please remain seated.

The question is this. Are you conscientiously opposed to capital ponishment? If you're conscientiously opposed to capital punishment, if you will, please stand. If you are not conscientiously opposed to capital punishment, remain seated.

All right, now all the jurors who are conscientiously opposed to capital punishment, please stand. Now ladies and gentlemen, those of you who are standing, those who are standing and who have indicated by doing so that you are conscientiously opposed to capital punishment, I'd like to address to you two additional questions. If your answer to either of these questions is, yes, I'd like to, if you would, please simply step up to the rostrum.

If your answer is no to both questions, then please remain where you are.

The first question is this. Would you allow your opinion about capital punishment to prevent you from voting for the death penalty in this case, regardless of what the evidence was?

MR. RIDLEY: I object. That's not a proper question.

MR. ENGLAND: Yes, it is a proper question, if your Honor please.

If your answer is yes to the question, please step forward to the rostrum.

Would you allow your opinion about capital punishment to prevent you from voting for the death penalty in this case regardless of the evidence?

And would the others still remain standing, those who are standing.

Let me address this last question to the other ladies and gentlemen who were standing. Everybody who was standing.

THE COURT: This is addressed to the ones who are standing, but who have not come forward.

MR. ENGLAND: This is addressed to every juror who has not come forward but who has indicated by standing, that you are conscientiously opposed to capital punishment.

The question is this. Would you allow your opinion about capital punishment to prevent you from being a fair and impartial juror on the issue of guilt or innocence as distinguished from the issue of punishment? If you would, would you please step forward.

If your Honor please, in relation to these ladies and gentlemen who have stepped forward in response to the questions, I would respectfully move to the Court that they be allowed to be excused for cause.

MR. RIDLEY: If the Court please, to which we would object to their being excused. We make the objection for each and every juror who is standing, the same objection; we would object to them being excused for cause.

THE COURT: Overrule such objection.

THE SHERIFF: Would you call off your names and panel numbers starting from here (indicating)....

Trial Transcript 278–81.

11. Posing questions to the group en masse and accepting non-verbal responses, evidenced by sitting or standing, is what we condemn. This procedure denied McCorquodale his constitutional right to procedural due process, as well as his Sixth Amendment right to trial by an impartially chosen jury. *Witherspoon* requires a showing that:

> Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position.

Witherspoon, 391 U.S. at 515–16 n.9, 88 S.Ct. at 1773–4, n.9, 20 L.Ed.2d at 781, n.9 (1968).

In *Witherspoon v. Illinois*, the Supreme Court said:

> Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.[11] No defendant can constitutionally be put to death at the hands of a tribunal so selected.

[11] Just as veniremen cannot be excluded for cause on the ground that they hold such views, so too they cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment. And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a veniremen in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the *voir dire* testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion. See nn. 5 and 9, supra.

> We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*. Nor does the decision in this case affect the validity of any sentence *other* than one of death. Nor, finally, does today's holding render invalid the conviction, as oppose [sic] to the *sentence*, in this or any other case.

391 U.S. at 522, 88 S.Ct. at 1776, 20 L.Ed.2d at 784–85 (emphasis in original; footnote 22 omitted).

It is our task to determine whether the group questioning of the jury in the manner conducted here sufficiently complied with the *Witherspoon* test.[12] Were veniremen excluded "for cause simply because they voiced general objections to the death penalty"? Was it determined here whether a juror would "be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances"? Can one readily conclude that "the only veniremen who were in fact excluded for cause were *those who made unmistakably clear* . . . that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them"?

In our analysis, we turn for assistance to *Burns v. Estelle*, 626 F.2d 396 (5th Cir.1980) (en banc),[13] where the court, relying upon *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), had the following to say after a discussion of the incomplete questioning of a juror:

> Further questioning, which was denied, might well have either revealed that she could lay her personal views aside, follow the court's instructions, and do her duty as a citizen or made unmistakably clear that she could not or would not do so. What her answers might have been will never be known. She was therefore prematurely excused, with the showing required by *Witherspoon* for her dismissal incomplete. Since she was, Burns' death sentence cannot be carried out. . . .

626 F.2d at 398.

[7] As in *Burns*, we hold that the jurors in this case were prematurely excused. The

12. In *United States v. Blanton*, 700 F.2d 298 (6th Cir.1983), the court reviewed the background question of conducting voir dire without individually questioning jurors. Under the circumstances presented in that case, the court found an en masse questioning of jurors on the issue of pretrial publicity to be inadequate to detect resulting prejudice.

13. In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (en banc), this court adopted as binding precedent all the decisions that the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

requirement that it be made unmistakably clear that the jurors would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them was not met. None of the jurors were given an opportunity to demonstrate a "willing[ness] to consider all of the penalties provided by state law" or an opportunity to demonstrate an absence of any "irrevocabl[e] commit[ment], before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." *Witherspoon*, 391 U.S. at 522 n. 21, 88 S.Ct. at 1777 n. 21, 20 L.Ed.2d at 785 n. 21.

The fact that the jurors were questioned as a group compounds the chances for misunderstanding. The individual is not able to request further explanation or indicate that he does not understand the question.[14]

Courts have addressed the issue of group directed voir dire in the somewhat similar context of pretrial publicity cases.[15] After surveying various Supreme Court and circuit court opinions, the Sixth Circuit concluded, "What most courts consider the most important element in determining whether a presumption of prejudice should arise is the *strength* of the venireman's opinion which he is asked to set aside." *United States v. Blanton*, 700 F.2d 296, 305 (6th Cir.1983) (emphasis supplied).

In appellant's case, the *strength* of the group-questioned veniremen's opinions is impossible to ascertain. One juror, who was questioned individually during the voir dire occurring after the group of 15 had been excused for cause, stated that he had not understood a question posed to him regarding his ability to base his verdict on the evidence presented and the law given by the court. The juror obviously had not understood the group questioning since further probing resulted in four replies that he could not vote for the death penalty under any circumstances.[16]

[8] As the Supreme Court stated in *Witherspoon*, "The critical question, of course, is not how the phrases employed in this area have been construed by courts and commentators. What matters is how they might be understood—or misunderstood—by prospective jurors." *Witherspoon*, 391 U.S. at 515–16 n. 9, 88 S.Ct. at 1774 n. 9, 20 L.Ed.2d at 781 n. 9. In the case today, the lack of a follow-up inquest after the initial inquiry requires reversal.[17] A trial court

14. This potential for misunderstanding is evidenced in *Granviel v. Estelle*, 655 F.2d 673 (5th Cir.1981), *cert. denied*, 455 U.S. 1003, 102 S.Ct. 1636, 71 L.Ed.2d 870, 455 U.S. 1007, 102 S.Ct. 1644, 71 L.Ed.2d 875 (1982), where the court said:

> Of the five veniremen whose exclusion *Granviel* challenges, the district court held, in accordance with the magistrate's recommendation, that one venireman, Donald L. Harrison, was improperly excused for cause for merely voicing conscientious scruples against the death penalty. We, too, believe that Harrison's exclusion for cause constituted a *Witherspoon* violation. He was first asked whether he had conscientious scruples against the infliction of the death penalty, whereupon he stated, "I don't know what that means." When asked if he could ever vote to inflict the death penalty, he replied, "No, I don't *think* I could." Then, in response to the question, "You just don't *feel* like you would be entitled to take another person's life in that fashion?" He nodded and then said, "No, I could not." These questions and answers fall far short of an affirmation by Harrison that he would automatically vote against the death penalty regardless of the evidence, or that his objections to capital punishment would prevent him from making an impartial decision as to guilt.

655 F.2d at 677 (emphasis in original; footnotes omitted).

15. The mandates of *Witherspoon*, unlike the pretrial publicity cases, necessarily involve the composition of a jury specifically empanelled to determine whether a man deserves to live or die should he be found guilty of the underlying crime.

16. Trial Transcript 402–03 (voir dire of juror Kidd).

17. In pretrial publicity cases in this circuit, the approved test is for the judge to determine what information the prospective jurors have received, to inquire into the prejudicial effect of such information, and to make an independent determination regarding the panel member's impartiality. *E.g., United States v. Davis*, 583 F.2d 190 (5th Cir.1978). Qualifying *Davis*, the court in *United States v. Gerald*, 624 F.2d 1291 (5th Cir.1980), *cert. denied*, 450 U.S. 920, 101 S.Ct. 1369, 67 L.Ed.2d 348 (1981), stated that the individual voir dire described in *Davis* generally is not necessary where appellant makes unsupported general allegations of prejudice or

must determine that the juror understands the difficult distinction between possessing a personal opinion regarding capital punishment and the ability to subordinate that view in order to perform his duty as a juror. In order to ascertain that a juror understands this distinction, we hold that a trial court must require a thorough and informative questioning of each juror.[18]

Excusal of Woodlief and Kidd

After the excusal for cause of the group of 15 veniremen, the prosecutor began individually questioning the remaining veniremen. Upon receiving an affirmative answer to the question of whether Miss Woodlief would base her verdict on the evidence and the law, the prosecutor asked the juror whether she really believed in capital punishment. Miss Woodlief answered in the negative, stating that she had first thought under certain situations she could vote for the death penalty but that now she did not "think" she could do it. Trial Transcript 401. She was then excused without further questioning.[19] No mention was made of an automatic vote or whether she could lay aside her personal view. In *Granviel v. Estelle*, 655 F.2d 673 (5th Cir.1981), *cert. denied*, 455 U.S. 1008, 102 S.Ct. 1686, 71 L.Ed.2d 870, 455 U.S. 1007, 102 S.Ct. 1644, 71 L.Ed.2d 875 (1982), the Fifth Circuit held insufficient a similar colloquy.

The very next juror was also excused for cause. There, Mr. Kidd stated that he did not think he could vote for the death penalty under any circumstances. In Mr. Kidd's case, the court attempted to ascertain the strength of the juror's opposition to capital punishment by repeating the question three times. Each time Mr. Kidd stated unequivocally his inability to vote for the death penalty, and the court then excused him.[20]

[9] Thus, although it appears that Mr. Kidd was correctly excused under the *Witherspoon* rule, the questioning of Miss Woodlief was insufficient. The excusal of Miss Woodlief provides an additional reason for the vacating of the sentence in this case. *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976).

For the foregoing reasons, we reverse and remand to the district court with directions to issue the writ of habeas corpus, subject to the state's right to hold a resentencing hearing within a reasonable time.[21] *Goodwin v. Balkcom*, 684 F.2d 794, 820 (11th Cir.1982).

where no significant potential of prejudice exists. *Id.* at 1298. The general rule is, thus, that group questioning suffices to determine whether jurors had prior knowledge of the case—it is the absence of an exploratory examination of those jurors responding affirmatively to the group questioning that resulted in reversals in *Davis* and similar cases. *E.g., United States v. Hawkins*, 658 F.2d 279 (5th Cir. Unit A 1981).

18. The requirment that a trial judge determine a juror's understanding of the *Witherspoon* inquiry is similar to the requirement of Rule 11 of the Federal Rules of Criminal Procedure that a court, before accepting a plea of guilty, "address the defendant personally in open court and inform him of and determine that he understands [certain rights to which he is entitled]." Fed.R.Crim.P. 11 (1983). Interpreting Rule 11, the court in *Mack v. United States*, 635 F.2d 20 (1st Cir. 1980), stated:

> Although the district court informed Mack of the charges, it did not determine that the defendant understood the nature of the charges. Simply informing a defendant of the charges does not "establish on the record that the court personally determined that the defendant *understood* the charges." *United States v. Wetterlin*, 583 F.2d at 350 n.6. Furthermore, "[r]outine questioning or a single response by the defendant that he understands [the nature] of the charge, is insufficient," *Woodward v. United States*, 426 F.2d 969, 982 (3d Cir. 1970). The court should "engage in extensive an interchange as necessary to assure itself and any subsequent reader of the transcript that the defendant does indeed fully understand the charges." *United States v. Coronado*, 554 F.2d at 173.

635 F.2d at 26.

19. Defense counsel immediately objected to the excusal. Trial Transcript 401.

20. Defense counsel also entered a contemporaneous objection to this excusal. Trial Transcript 404.

21. When the district court fixes the time within which to conduct the resentencing hearing, it should take into account the inherent difficulty in locating former witnesses after such a lengthy passage of time. However, in the event the witnesses cannot be located, we note the possibility of employing Ga.Code Ann. sec. 38-314 (1981). *See, e.g., Rini v. State*, 236 Ga. 715, 225 S.E.2d 234, *cert. denied*, 429 U.S. 924, 97 S.Ct. 326, 50 L.Ed.2d 293 (1976); *Gibson v. State*, 160 Ga.App. 615, 287 S.E.2d 595 (1981).

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

KRAVITCH, Circuit Judge, concurring in part and dissenting in part:

I concur in all portions of the majority opinion except its resolution of the *Witherspoon* issue. On that issue, I respectfully dissent.

The majority correctly notes that the Supreme Court in *Witherspoon* stated:

> [N]othing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made *unmistakably clear* (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would *prevent* them from making any impartial decision as to the defendant's *guilt*.

Witherspoon v. Illinois, 391 U.S. at 522 n. 21, 88 S.Ct. at 1777 n. 21 (some emphasis added and some in original).

Under this standard, the voir dire examination in the instant case complied with the *Witherspoon* mandate: each and every potential juror excused for cause due to their attitude toward the death penalty made "unmistakably clear" in response to precise questions that their views would *prevent* their impartial decision in either the penalty or guilt phase of the trial.

Two novel issues in the *Witherspoon* context are presented: whether *Witherspoon* requires that the voir dire questions be propounded to each juror individually and whether the responses must be verbal. Neither issue has been decided by this circuit [1] or the Supreme Court. Although individual voir dire and verbal responses usually are preferable, they are not the touchstone of *Witherspoon* compliance.[2] More important than form is the substance of both the inquiry and responses: that the questions precisely and unambiguously instruct the jurors as to the *Witherspoon* qualifications and that the jurors' responses be clear and unequivocal. In most instances the most definite response will be in a verbal form. Verbal responses however are not talismans for clarity. They are often fraught with ambiguity. Much turns on the tone of voice, the facial expression and the demeanor of the venireperson as the response is delivered. Even a simple 'yes,' although on a cold written record appearing crystal clear, can be delivered in a manner that conveys doubt. For this reason, when as here the questions asked were precise and closely tracked the *Witherspoon* standards, deference should be given to the trial court's assessment of whether the responses made clear that the objection to the death penalty was of a degree to warrant excusing the potential juror. *See Irvin v. Dowd*, 366 U.S. 717, 723–24, 81 S.Ct. 1639, 1642–43, 6 L.Ed.2d 751 (1961) (trial court's finding of strength of prospective juror's opinion based on publicity should not be set aside unless error is 'manifest'); *United States v. Robbins*, 500 F.2d 650, 653 & n. 3 (5th Cir.1974) [3] (ruling on suggestions of impartiality is within discretion of trial court and abuse of that discretion must be clear to warrant reversal).

The rationale does not differ when the responses are nonverbal. As with verbal answers, nonverbal responses can and must be assessed for the demeanor, facial expression and degree of hesitancy, or lack thereof, evidenced as the response is made. In this regard an appellate tribunal should defer to the trial judge who was present. An appellate court is handicapped to do otherwise. *See Rosales-Lopez v. United States*, 451 U.S. 182, 188, 101 S.Ct. 1629, 1636, 68 L.Ed.2d 22 (1981); *Irvin v. Dowd*, 366 U.S. at 723–24, 81 S.Ct. at 1642–43; *United*

1. *Cf. Goodwin v. Balkcom*, 684 F.2d 794, 816 (11th Cir.1982) ("[I]t may be possible in some instances for a court to decide that a response other than verbal is unquestionably unambiguous").

2. I find no precedent for a holding, and do not read the majority as enunciating a rule, that nonverbal responses can never satisfy the exacting standards of *Witherspoon*.

3. The Eleventh Circuit, in the en banc decision *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

States v. Robbins, 500 F.2d at 653 n. 3, quoting *Reynolds v. United States*, 98 U.S. 145, 156, 25 L.Ed. 244 (1878).

In *Burns v. Estelle*, 626 F.2d 396 (5th Cir.1980), on which the majority relies, the court determined it was error under *Witherspoon* to excuse a venireperson who was asked only whether her views on the death penalty would "affect" her decision. Affirming that her views would " 'affect' her deliberations, with little or no indication of how profound that effect would be . . . was not enough." *Id.* at 398. The questions addressed to the venireperson in *Burns* did not clearly and precisely pose the critical *Witherspoon* issue: would the venireperson's attitude toward the death penalty *prevent* her from making an impartial decision as to guilt or innocence or cause her *automatically* to vote against the death penalty *regardless of* the evidence. *Witherspoon*, 391 U.S. at 522, 88 S.Ct. at 1777. In *Burns*, failure to pose the question at any point in the voir dire meant the venireperson was "prematurely excused," *Burns v. Estelle*, 626 F.2d at 398, and further questions were required. *See also Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980).

In contrast, here the prosecutor's questions were unconvoluted, precise and directly posed the crucial *Witherspoon* issues. The majority points to no flaw in the questions.[4] After explaining to the venire that three questions would be asked and asking them to stand up if their answer to the first was 'yes,' the prosecutor enunciated the following query:

> The [first] question is this. Are you conscientiously opposed to capital punishment? If you're conscientiously opposed to capital punishment, if you will, please stand. If you are not conscientiously opposed to capital punishment, remain seated. [Nineteen of approximately sixty persons rose].

Trial Transcript at 279. This clearly is a proper initial *Witherspoon* question, geared at identifying those to whom further questioning should be directed. The prosecutor then proceeded.

> All right, now all the jurors who are conscientiously opposed to capital punishment, please stand. Now ladies and gentlemen, those who are standing and who have indicated by doing so that you are conscientiously opposed to capital punishment, I'd like to address to you two additional questions. If your answer to either of these questions is, yes, I'd like to, if you would, please simply step up to the rostrum. If your answer is no to both questions, then please remain where you are.
>
> The first question is this. Would you allow your opinion about capital punishment to *prevent* you from voting for the death penalty in this case, *regardless of what the evidence was*? [At this point defense counsel objected on the ground that this question was improper and then the questioning proceeded with the prosecutor repeating the same question].
>
> Would you allow your opinion about capital punishment to prevent you from voting for the death penalty in this case regardless of the evidence? [At this time some of the jurors standing stepped forward and the prosecutor asked all those who had stood in response to the first question to remain standing]. . . .
>
> This is addressed to every juror who has not come forward but who has indicated by standing, that you are conscientiously opposed to capital punishment.
>
> The question is this. Would you allow your opinion about capital punishment to *prevent* you from being a fair and impartial juror on the issue of guilt or innocence as distinguished from the issue of punishment? If you would, would you please step forward. [Here some of the remaining jurors standing stepped forward. In all, fifteen of the nineteen persons who had stood up had stepped forward and were excused for cause. Four did not step forward and were not ex-

4. The questions here stand in sharp contrast to those articulated in *Granviel v. Estelle*, 655 F.2d 673 (5th Cir.1981), *cert. denied*, 455 U.S. 1003, 102 S.Ct. 1636, 71 L.Ed.2d 870 (1982) on which the majority relies. *See* Maj.Op. at 1560. The questions there posed were ambiguous and the venireperson indicated confusion and lack of understanding. Here the questions succinctly and clearly posed the critical *Witherspoon* inquiry and the record reveals no hesitation or confusion on the part of any venireperson. *See* text *infra*, at 1564.

cused for cause. Defense counsel objected generally].

Trial Transcript at 279–81 (emphasis supplied). *See McCorquodale v. Balkcom*, 525 F.Supp. 408, 424 (N.D.Ga.1981).

The majority holds that, as in *Burns*, the venirepersons were excused prematurely. However, no further questions could have posed the relevant inquiry more effectively.[5] The critical questions were asked immediately. In my view, proceeding directly to the relevant issues fosters understanding by the jurors who are saved the confusion engendered by precatory questioning that misses the *Witherspoon* mark.

Defense counsel here, unlike in *Burns*, 626 F.2d at 397–98 n. 2, made no suggestions of any further questions that should be asked. Rather counsel objected only generally to the form of the questions, and to the dismissal of the jurors as a whole. If the basis for any further objection existed, e.g., hesitation on the part of those stepping forward, the burden was on defense counsel to raise the issue. *Cf. Goodwin v. Balkcom*, 684 F.2d at 816 (11th Cir.1982) (failure of defense counsel to raise *Witherspoon* violation is evidence of ineffectiveness).[6]

Under these circumstances, I would hold that one who, without hesitation,[7] stood up and then stepped forward in response to these precise questions was stating unequivocally and unambiguously that in no event would he or she vote to impose the death penalty or that his or her views on the death penalty would prevent an impartial determination of guilt or innocence.

The second issue raised is the collective questioning of the venire. Although no case has decided the propriety of such questioning in the *Witherspoon* context, as the majority notes cases have addressed the issue in determining the impact of pretrial publicity.[8] *See Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); *United States v. Hawkins*, 658 F.2d 279 (5th Cir. 1981); *United States v. Gerald*, 624 F.2d 1291 (5th Cir.1980), *cert. denied*, 450 U.S. 920, 101 S.Ct. 1369, 67 L.Ed.2d 348 (1981).

Generally, the method of voir dire examination is committed to the sound discretion of the trial courts, limited by the requirements of due process. *United States v. Hawkins*, 658 F.2d at 283; *United States v. Gerald*, 624 F.2d at 1296; *United States v. Delval*, 600 F.2d 1098, 1102 (5th Cir.1979). *See Irvin v. Dowd*, 366 U.S. 717, 723–24, 81 S.Ct. 1639, 1642–43, 6 L.Ed.2d 751 (1961). The trial court's discretion includes the decision whether voir dire should be conducted collectively or individually, *United States v. Gerald*, 624 F.2d at 1296, and no different rule is required when *Witherspoon* qualification is in issue.

In *United States v. Davis*, 583 F.2d 190 (5th Cir.1978), in light of extensive pretrial publicity, the trial court asked any veniréperson who felt that the publicity had impaired his ability to render an impartial decision to raise his hand. When none responded the court refused defense counsel's request to examine each venireperson individually. *Id.* at 196. In overturning the convictions the Fifth Circuit stated: "Though separate examination of jurors is sometimes preferable, it is not necessarily required." *Id.* at 196–97 (footnotes omitted). However, on the facts of *Davis* where only one question was asked and the ques-

5. *Burns* does not set up a requirement as to the *number*, but rather the *quality* of questions that must be asked. Excusing the jurors in *Burns* was deemed premature only because the relevant and critical questions had yet to be asked.

6. The record reveals no impediment to defense counsel proffering more questions or asking that the court or prosecutor pursue further questioning. *Cf. Goodwin v. Balkcom*, 684 F.2d at 814 (court refused defense counsel's request to question further the jurors excused for cause). *See United States v. Butera*, 677 F.2d 1378, 1383–84 (11th Cir.1982) (no error in court conducted voir dire where all questions that counsel proffered were asked).

7. There is no evidence in the record that any of the venirepersons hesitated before standing up or stepping forward.

8. Critical to the analysis in pretrial publicity cases is an assessment of whether, from the publicity, a juror has developed an opinion about the case and whether the juror can lay aside any impression or opinion developed. *Irvin v. Dowd*, 366 U.S. at 723, 81 S.Ct. at 1642–43; *United States v. Davis*, 583 F.2d at 197; *Calley v. Callaway*, 519 F.2d 184, 205–06 (5th Cir.1975) (en banc), *cert. denied*, 425 U.S. 911, 96 S.Ct. 1505, 47 L.Ed.2d 760 (1976). Thus, the inquiry is closely analogous to that required in the *Witherspoon* context.

tion did not ascertain the critical information needed to determine whether pretrial publicity had affected the right to an impartial jury, the court ruled that the trial court had an insufficient basis for exercising its duty to decide whether that right had been impaired. *Id.* at 197–98. "Without establishing an inflexible rule" for accomplishing the task, *id.* at 198, the court held that the trial court must assess whether the critical questions in pretrial publicity cases have been answered. *Id.* at 197–98.

In *United States v. Gerald*, 624 F.2d at 1297–98, where virtually the same question was asked as in *Davis*, counsel for defendant failed to direct the court's attention to specific items of publicity and did not request individual voir dire. Distinguishing *Davis*, the court upheld the convictions. *Id.* at 1296–98.

These two cases are helpful to our inquiry. First, individual questioning is not required if other effective means of eliciting necessary responses are used.[9] *United States v. Davis*, 583 F.2d at 196–97, 198. Second, specific objections and requests for individual voir dire are crucial. *Compare United States v. Davis*, 583 F.2d at 196 *with United States v. Gerald*, 624 F.2d at 1297–98. The absence of specific objection or request for individual or further group questioning is a valuable indicia that the procedures utilized were satisfactory to defense counsel and that none of the circumstances of the voir dire prompted counsel to consider a particular, alternative procedure more appropriate. *See United States v. Butera*, 677 F.2d 1376, 1383–84 (11th Cir. 1982). In the instant case defense counsel, while not barred from doing so, did not bring to the court's attention that any of the venirepersons who stood up and stepped forward appeared hesitant or confused; nor does the record otherwise indicate any hesitation or confusion. No request for individual voir dire was made. Accordingly, I find no error in use of the group voir dire in lieu of individual examination of each juror. *See United States v. Gerald*, 624 F.2d at 1297–98; *United States v. Shavers*, 615 F.2d 266, 268 (5th Cir.1980); *United States v. Delval*, 600 F.2d at 1102.

The majority states that the venirepersons "[were] not able to request further explanation or indicate that [they] [did] not understand the question." Majority Opinion, at 1559. There is no indication in the record that the prospective jurors were precluded from articulating any lack of understanding of the questions or asking for clarification.

Concluding that there is no inherent constitutional defect in either the collective voir dire or the elicitation of nonverbal responses, in light of the clear, precise articulation of the crucial *Witherspoon* questions, I would affirm the challenges for cause of the venirepersons excused pursuant thereto.

This leaves the dismissal of Ms. Woodlief. While she did not respond to the collective voir dire by standing up, upon reconsideration and after having had the benefit of hearing in context all of the precise questions directed to the entire panel, she indicated that she did not believe in capital punishment. The following dialogue ensued:

> THE COURT: You didn't understand the question that was posed to you awhile ago?

9. In *United States v. Blanton*, 700 F.2d 296, 305 (6th Cir.1983), a prejudicial publicity case on which the majority relies in concluding that without individual questioning the strength of a venireperson's opposition to capital punishment is impossible to ascertain, the Sixth Circuit did not condemn group voir dire. To the contrary, the *Blanton* court relies in large part on *United States v. Davis*, *supra*, in concluding that individual voir dire is not necessarily required. *United States v. Blanton*, 700 F.2d at 306. In *Blanton* the court reversed the conviction because the questions were not extensive enough to allow the trial court to determine whether prejudice existed. "The trial court's questioning was less extensive here than in any of the cases from other circuits which found the questioning adequate. No inquiry was made of the veniremen about the extent of their exposure to the case . . . More important, the trial court did not ask the veniremen whether any had formed an opinion about the case." *Id.* at 307. Thus, *Blanton* stands for no more than the proposition, with which I have no dispute, that failure to ask the critical questions will make a group voir dire inadequate.

THE JUROR: Yes, I did at that time. I thought that under certain situations and possibly to rationalize this to myself, but sitting here and observing, *I don't think I could do it, I really don't.*

[She was then excused for cause. Defense counsel invoked the "same objections as to the others."]

Trial Transcript at 400–01 (emphasis supplied).

The majority focused solely on the use of the word "think" to conclude that Ms. Woodlief's answer was ambiguous. However, we cannot evaluate the words when taken out of context. The complete statement "I don't think I could do it, *I really* don't" (emphasis supplied) convinces me of the unambiguous nature of her response. Moreover, this potential juror had the time to reflect on her earlier response and specifically indicated that she had changed her conclusion. Although an appellate court is deprived of the benefit of hearing her tone of voice and observing her demeanor, see discussion *supra* at 1561, the response given, when judged in light of the opportunity to reflect and the emphasis supplied by the repetitive statement, "I don't think I could do it, I really don't", is unambiguous. Once again, the defense counsel raised no specific objection and offered no questions which could be used to rehabilitate the potential witness. Defense counsel simply and routinely asserted the "same objections as to the others."

Viewing the totality of the voir dire of Ms. Woodlief, I would affirm this challenge for cause.

Accordingly, I would affirm on all grounds the denial of habeas corpus relief.

Timothy West McCORQUODALE

v.

Charles BALKCOM, Warden, Georgia State Prison.

Civ. A. No. C79-95.

United States District Court,
N. D. Georgia,
Atlanta Division.

Oct. 21, 1981.

In habeas corpus proceeding by state prisoner, the District Court, Orinda D. Evans, J., held that: (1) in view of trial strategy employed by defendant, trial court's charge on rebuttable presumption of intent, in murder prosecution, was not prejudicial; (2) on record, confession was voluntary; (3) no error was shown in jury selection; (4) evidence did not compel any inference of intentional or purposeful racial discrimination in jury selection, and same was true even if evidence showed gross statistical disparity between defendants receiving death penalty where victim was white and defendants receiving death penalty where victim was black; (5) cautionary instruction cured any harm or prejudice caused by prosecution's remark in closing argument;

(6) it was not shown that Georgia's system of appellate review in capital cases operated to deny defendant effective assistance of counsel, fundamentally fair and reliable review of death sentence and right not to suffer cruel and unusual punishment; and (7) procedure for examination for insanity subsequent to conviction was not shown to be unconstitutional.

Petition denied.

1. Criminal Law ⇐778(6)

Charge flatly stating that "law presumes" any fact is objectionable where it gives heavy-handed assist to party favored by presumption in meeting its burden of persuasion, and, in murder prosecution, instruction that law presumes that person intends to accomplish natural and probable consequences of his act was objectionable though it also stated that presumption could be rebutted. Ga.Code, §§ 26–1101(a), 26–1102, 26–1103.

2. Habeas Corpus ⇐30(1)

In view of trial strategy employed by defendant, including admission to the jury that client was guilty, objectionable portion of charge, to effect that law presumes that person intends to accomplish natural and probable consequences of his acts, was not prejudicial. Ga.Code, §§ 26–1102, 26–1103.

3. Criminal Law ⇐997.3

Erroneous jury charge will support collateral attack on state court judgment only if charge so infected trial as to render it fundamentally unfair. 28 U.S.C.A. § 2241 et seq.

4. Criminal Law ⇐1162

It is possible in limited circumstances for constitutional error to be harmless.

5. Arrest ⇐63.4(7)

In view of information received from two different police informants acting independently, and in view of information previously received by police and in view of specific details related to police, there was probable cause for arrest of defendant on homicide charge. U.S.C.A.Const.Amend. 4.

6. Criminal Law ⇐526

Under evidence, defendant was able to make reliable confession though he had been drinking, and, under evidence, confession was voluntary.

7. Criminal Law ⇐519(8)

Failure of police to immediately or promptly take suspect before magistrate or other convenient officer for issuance of warrant was not coercive, as bearing upon voluntariness of confession. Ga.Code, § 27–212; U.S.C.A.Const.Amend. 5.

8. Jury ⇐108

Taking into account numerical ratio, in that there was something in excess of 60 persons among prospective jurors and 19 persons rose in response to initial request for all opposed to capital punishment to rise, and in view of fact that state's follow-up questions to standing jurors required those opposed to death penalty to take further positive action, stepping forward again, to declare their opposition to death penalty, procedure was not deficient under *Witherspoon*, in view of fact, also, that defendant was not refused opportunity to further voir dire the standing jurors. Ga.Code, § 26–3102.

9. Jury ⇐108

On record, both of two jurors ultimately did make it unmistakably clear that they could not vote for death penalty, and were properly excused, though they had indicated some initial equivocation. Ga.Code, § 26–3102.

10. Jury ⇐33(2.1)

Defendant was not entitled, under Sixth and Fourteenth Amendments, to select from among those prospective jurors who admittedly were unalterably opposed to death penalty, and his right to select from group representing true cross section of community was not abridged. U.S.C.A. Const.Amends. 6, 14; Ga.Code, § 26–3102.

11. Jury ⇐33(1.3)

Evidence did not compel any inference of intentional or purposeful racial discrimination in jury selection, and same was true

even if evidence showed gross statistical disparity between defendants receiving death penalty where victim was white and defendants receiving death penalty where victim was black. U.S.C.A.Const.Amends. 8, 14; Ga.Code, §§ 26-3102, 27-2503, 27-2534.1.

12. Criminal Law ⇐739(1)

In murder prosecution, prosecutor's statement during closing argument to jury at sentencing phase of trial that "And after your decision, the Appellate Court will have a very import[illegible] responsibility" was objectionable, but [illegible]inary instruction had sufficient curative [illegible]ect to avoid any deprivation of due [illegible]ocess. U.S.C.A.Const. Amends. 5, 14.

13. Criminal Law ⇐1134(1)

Defendant failed to show that Georgia's system of appellate review in capital cases operated to deny him effective assistance of counsel, fundamentally fair and reliable review of death sentence, and his right not to suffer cruel and unusual punishment, in view of fact, inter alia, that defendant failed to indicate that there were nonappealed life sentence cases involving torture-murder that could have been compared to his case by the Georgia Supreme Court. U.S.C.A.Const.Amends. 6, 8; Ga. Code, §§ 27-2534.1(b)(7), 27-2537, 27-2537(c), (c)(3), (f).

14. Constitutional Law ⇐255(5)
Criminal Law ⇐1206(1)

Georgia statutory procedure under which Governor "may" order examination of person convicted of capital offense and on which convicted offender "shall" be received in the state hospital if he or she is declared insane did not deny due process to defendant convicted of capital offense. Ga. Code, §§ 27-2601 to 27-2608.

15. Constitutional Law ⇐278(1)
Criminal Law ⇐1213

Death by electrocution was not shown to constitute cruel and unusual punishment in violation of Eighth and Fourteenth Amendments. U.S.C.A.Const.Amends. 8, 14.

John R. Myer, Atlanta, Ga., Jack Greenberg, James M. Nabrit, III, Joel Berger, John Charles Boger, New York City, Anthony G. Amsterdam, Stanford, Cal., for plaintiff.

Lewis R. Slaton, Fulton County Dist. Atty., H. Allen Moye, Asst. Fulton County Dist. Atty., John W. Dunsmore, Jr., Asst. Atty. Gen., State of Ga., Atlanta, Ga., for defendant.

ORDER

ORINDA D. EVANS, District Judge.

This petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 *et seq.*, in which Petitioner seeks release from state custody, is now before the Court on the Magistrate's Report and Recommendation.

Timothy West McCorquodale was convicted of murder and sentenced to death in the electric chair in the Superior Court of Fulton County, Georgia, on April 12, 1974. On December 3, 1974, the Georgia Supreme Court affirmed his conviction and sentence. *See McCorquodale v. State*, 233 Ga. 369, 211 S.E.2d 577 (1974), *cert. denied sub nom. McCorquodale v. Georgia*, 428 U.S. 910, 96 S.Ct. 3223, 49 L.Ed.2d 1218, *rehearing denied*, 429 U.S. 873, 97 S.Ct. 190, 50 L.Ed.2d 154 (1976). He tried unsuccessfully to obtain habeas corpus relief in state court, *McCorquodale v. Stynchcombe*, 239 Ga. 138, 236 S.E.2d 486 (1977), *cert. denied*, 434 U.S. 975, 98 S.Ct. 534, 54 L.Ed.2d 467, *rehearing denied*, 434 U.S. 1041, 98 S.Ct. 784, 54 L.Ed.2d 792 (1978), and to obtain a new trial by extraordinary motion, 242 Ga. 507, 249 S.E.2d 211 (1978). McCorquodale then filed the present petition for writ of habeas corpus attacking both his conviction and his death sentence.

FACTS

The trial transcript reflects the following chronology: immediately prior to the beginning of the trial, Petitioner tried unsuccessfully to tender a guilty plea. (Tr. 32, 40, 96). The plea was opposed by the State,

there being some question as to whether the death penalty could be imposed on a guilty plea.[1] Although the judge ultimately decided the Georgia statute would permit him to impose the death penalty (Tr. 69–70), he rejected the plea because of his own stated conscientious objection to the death penalty. (Tr. 72–73).

There then ensued a debate between counsel as to how to handle appropriately the plea which was to be inscribed on the indictment and thus revealed to the jury.[2] Counsel for Petitioner refused to sign a "not guilty" plea. (Tr. 73–74). Therefore, counsel for Petitioner was directed to enter the plea as "guilty" on the indictment. (Tr. 74–75). This was done. (Tr. 75). Having done this, however, the court again indicated it was not accepting the guilty plea. (Tr. 96). The court then decided that the legal posture of the case was then such that the Petitioner was deemed to "stand mute" (Tr. 97–98) and that that was equivalent to a plea of not guilty.

Following a hearing on the Petitioner's motion to suppress his confession and the jury selection, Petitioner's counsel stated the following in his opening statement:

> Ladies and gentlemen, we have been here trying to plead guilty for two days.
>
> ....
>
> Ladies and Gentlemen, we're guilty. We know it. It's that simple. And I think when you go throughout this trial and throughout this whole hearing you'll never hear any statement from us other than that. So that's the posture we are in today. We don't deny what the witnesses are going to say. I ask you to please even though here before you we say we're guilty, I ask you to please be attentive ... I couldn't go into [the evidence] in detail [during voir dire], neither could Mr. England, but I tried to show you Ladies and Gentlemen, we are guilty. (Tr. 468–69).

Briefly stated, the facts as revealed by the State's witnesses were the following: One evening, Petitioner and a friend of his known only as Leroy were having drinks in a bar in Atlanta's "strip" area with Petitioner's girlfriend Bonnie and an acquaintance of hers, Donna Dixon, who was at that point passing through Atlanta on her way to Florida. Apparently, at some point prior to that meeting, Leroy had given Donna $50.00. While they were having drinks, Leroy told Petitioner he was upset, having learned that Donna had given the $50.00 to a Negro pimp.[3] An argument ensued wherein Donna either took the position that Leroy had not given her any money or that she did not have the money.

The Petitioner, Leroy, Donna and Bonnie got in a cab and went to an apartment belonging to Bonnie and a female roommate, and where the Petitioner and Bonnie's three-year old daughter also lived. When they arrived, the group, including the roommate Linda, sat down in the living room. According to Bonnie, "... all of a sudden he [the Petitioner] said to Leroy, I think we ought to teach this girl not to be 'a nigger lover.'" (Tr. 499). Thereafter, Petitioner removed Donna's clothing and over a period of approximately two and one-half hours, performed various types of sexual torture and mutilation on her.[4] Both Petitioner and Leroy had intercourse and oral sex with her. During most of the time Donna was gagged, bound and lying on the floor. Bonnie and the roommate Linda sat and watched[5], with Bonnie occa-

1. The Georgia statute providing for jury determination of the sentence in capital cases appears to cover only the situation where the issue of guilt has been determined by a jury. *See* Ga.Code Ann. § 26-3102 (1977 rev.).

2. The customary procedure in this court is to send the indictment and plea out with the jury.

3. All of the indicated persons were white.

4. For a very detailed and graphic statement of these facts, *see McCorquodale v. State*, *supra*.

5. Bonnie and Linda testified at the trial. The two eyewitnesses' accounts of the foregoing were basically consistent with each other, although Linda indicated she had been absent from the room at various points during the torture sequence. Also, she did not witness the strangulation.

sionally responding to commands from the Petitioner to fetch various items.

Following the foregoing sequence of events, Petitioner granted Donna's request to go to the bathroom. At this time she was not tied or gagged and was unaccompanied.

While Donna was out of the room, Petitioner said he was "going to have to kill her." (Tr. 509). At his request, Bonnie furnished some rope. When Donna reappeared, the Petitioner strangled her, initially with the rope and then with his hands. After she was apparently dead, he broke her arms and legs in order to fit her body into a cardboard trunk. After an unsuccessful foray to locate a van to move the trunk, the Petitioner, Leroy, Bonnie and the roommate returned to the apartment. According to Bonnie, Petitioner and Leroy passed out on the couch and the two girls went to a nearby beauty parlor for Bonnie to get her hair done. (Tr. 517).

The strangulation and physical indicia of most[6] of the various torture techniques were confirmed by a physician who had examined the victim's body.

The next evening the victim's nude body was found on the side of a highway. The Petitioner was arrested later that night on an informant's tip. At 5:00 a. m. the Petitioner signed a detailed confession which corroborated the racial motive for the killing, the fact of the strangulation, and that the Petitioner had had to break the victim's arms and legs to get her into the trunk. This confession was introduced into evidence at the trial[7] over Petitioner's objections.

Petitioner called no witnesses and chose not to cross-examine many of the State's witnesses. However, through cross-examination of the physician called by the State, Petitioner elicited testimony that the victim's bones were not actually broken, but that there was only cartilage and tendon breakage (Tr. 618); further, the physician stated on cross that there does exist a medical phenomenon known as masochism (Tr. 621).

Defense counsel's closing argument indirectly suggested to the jury that the victim had willingly engaged in sadomasochistic activities with Petitioner[8] and that Bonnie's testimony, to the extent it suggested otherwise, was not credible. He then went on to say:

> Yes, he killed her. The evidence points to that and the State says that. We're going to get into some of this later on.... Come right to the gut of it, he's guilty of the crime of murder. Maybe he's guilty and the Judge is going to charge you [sic] murder. Maybe he's guilty of manslaughter.[9] The Judge is going to charge you that it has to be done with malice aforethought. You'll decide if it's malice or not. That's an issue I can't decide for you.... Try in your mind to ascertain what you believe happened out there and I think you'll find him guilty. Thank you. (Tr. 700–02).

The court charged the jury on the definition of murder as set forth in Ga.Code Ann. § 26–1101(a) (1977 rev.). It also charged that

> [t]he law presumes that a person intends to accomplish the natural and probable consequences of his acts and if a person uses a deadly weapon or instrumentality in the manner in which such weapon or instrumentality is ordinarily employed to produce death and thereby causes the

6. Among the more inflammatory parts of Bonnie's testimony was her statement that Petitioner had cut the victim's clitoris with a pair of scissors. This was not mentioned or confirmed by the physician.

7. The circumstances surrounding the confession are described in more detail in the section of this Order which deals with Petitioner's challenge to its admissibility.

8. Though Petitioner's counsel did not explicitly make this argument to the jury, the Court believes it is implied by his statements and also implied in his questions asked of the witnesses.

9. Petitioner's theory, advanced to the Judge out of the jury's presence, was that the killing was a crime of passion (*i. e.*, voluntary manslaughter) which resulted from a sadomasochistic orgy which got out of control. (Tr. 61–68).

death of a human being, the law presumes the intent to kill. This presumption may be rebutted. (Tr. 709).

Petitioner excepted to the charge on the ground that it failed to include a charge on voluntary manslaughter. Also, Petitioner excepted to the court's failure to instruct the jury that the Petitioner had a right to "stand silent." The court called the jurors back and gave a charge on Petitioner's right to stand silent, but no charge on voluntary manslaughter was given.

Pursuant to Georgia statute, the same jury which found Petitioner guilty also determined the sentence. In that hearing, the Petitioner introduced evidence which showed that the victim was a transient who, although a teenager, was masquerading under a false adult identity; that the Petitioner had been very drunk during the torture-murder sequence and that the victim did not appear to resist the acts of sex and torture, up to the point when the Petitioner began choking her. Petitioner also called a detective who testified that the day after the confession, Petitioner had been remorseful and had cried. On cross, the detective further stated this had occurred at the point when he had told Petitioner they had learned the victim in fact had not given the $50.00 to a black pimp.

In the closing arguments during that phase of the trial, counsel for the prosecution stated his view that both counsel and the trial court had performed their respective functions in a commendable way. He went on to say that the jury also had a vital contribution to make, "And after your decision, the Appellate Court will have a very important responsibility." (Tr. 766). The defense vigorously objected. The judge, after hearing the matter out of the presence of the jury, called the jury back and after characterizing the remark as "highly improper," instructed the jury to eliminate it from their minds "as though it was never made." (Tr. 770–71).

The closing arguments were concluded and Petitioner's motion for mistrial denied. The jury was charged relative to determination of the appropriate sentence. It returned a verdict fixing the penalty at death.

ISSUES

Petitioner raises the following ten contentions in support of his Petition: (1) the charge of the state trial court improperly shifted the burden of proof; (2) Petitioner's confession was not voluntary and therefore was wrongfully admitted into evidence; (3) "death scrupled" jurors were wrongfully excused for cause; (4) the Georgia death statute is being applied in a racially discriminatory manner; (5) regional variation in jury sentencing within Georgia indicates that the death penalty is being arbitrarily imposed; (6) the prosecutor's closing argument denied the Petitioner a fair trial; (7) the Georgia system of appellate review denied Petitioner effective assistance of counsel, a fundamentally fair sentence review, and his right not to suffer unusual punishment; (8) appellate review was inadequate because the Chief Justice of the Georgia Supreme Court was biased; (9) Petitioner is incompetent and should not, therefore, be executed; and (10) electrocution is a cruel means of punishment.

The Magistrate analyzed each of these contentions at length and found them lacking. He recommends that the Petition be denied. Petitioner has objected to virtually all of the Magistrate's findings and recommendations; therefore, a re-examination of each is required. In the discussion which follows, the Court will examine first Petitioner's contentions which relate to his conviction and then those attacking his sentence.

DISCUSSION

I. Petitioner's Conviction

A. Effect of Jury Charge

Petitioner contends that the trial court's instruction to the jury that they could presume Petitioner intended the natural consequences of his acts impermissibly lifted from the prosecution the burden of proving an essential element of the crime beyond a

reasonable doubt. Petitioner also argues that unconstitutional jury instructions affecting the burden of proof can never constitute "harmless error." The relevant portions of the charge are as follows:

> Now ladies and gentlemen, the defendant enters upon the trial of this case with the presumption of innocence in his favor and that presumption remains with him throughout the trial of the case until and unless the State produces evidence in your presence and hearing sufficient to satisfy your minds beyond a reasonable doubt of the defendant's guilt of the offense as charged in the bill of indictment. It is necessary for the State to prove every material allegation of the bill of indictment to your satisfaction and beyond a reasonable doubt by the production of evidence before you would be authorized to find the defendant guilty.
>
> * * * * * *
>
> Now, the State contends that the defendant is guilty of the offense of murder as charged in Indictment No. A-20206. A person commits murder when he unlawfully and with malice aforethought, either expressed [sic] or implied, causes the death of another human being. Express malice is that deliberate intention, unlawfully, to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.
>
> Malice in its legal sense, is not necessarily ill will or hatred. It is the unlawful, deliberate intention to kill a human being without justification or mitigation or excuse, which intention must exist at the time of the killing. I instruct you however, it is not necessary that this unlawful deliberate intention should exist for any particular length of time before the killing. *The law presumes that a person intends to accomplish the natural and probable consequences of his acts and if a person uses a deadly weapon or instrumentality in the manner in which such weapon or instrumentality is ordinarily employed to produce death and thereby causes the death of a human being, the law presumes the intent to kill. This presumption may be rebutted.*
>
> I further instruct you, a person will not be presumed to act with criminal intention, but the trier of facts may find such intention upon consideration of the words, conduct, demeanor, motive, and all other circumstances connected with the act for which the accused is prosecuted.
>
> Now ladies and gentlemen, I charge you that if you believe beyond a reasonable doubt that the defendant in this County at any time prior to the return of this indictment, with the weapon and instrumentality named in the indictment, and with malice aforethought, either expressed [sic] or implied, did unlawfully and intentionally kill the deceased as charged in the indictment, and you believe the weapon or instrumentality used in the manner used, if one was used, was one likely to produce death, then you would be authorized to convict the defendant of the offense of murder.
>
> After considering all the facts and circumstances, and after applying the principles of law given you in charge, in the event you should find the defendant guilty of the offense of murder, the form of your verdict would be, "We, the jury, find the defendant, Timothy W. McCorquodale, guilty of murder."
>
> Now ladies and gentlemen, applying the principles of law heretofore given you in charge by the Court, I instruct you, if from a consideration of the evidence or from a lack of evidence, you believe the defendant not guilty, or if there rests upon your minds a reasonable doubt as to the defendant's guilt, it would be your duty to acquit him and the form of your verdict would be, "We, the jury, find the defendant, Timothy W. McCorquodale, not guilty."

(Tr. 704, 708-11) (emphasis added).

Petitioner challenges the underlined portion of the foregoing excerpt from the charge. In *Sandstrom v. Montana*, 442 U.S.

510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), the Supreme Court held that in a criminal case where intent was an issue, a jury charge that "the law presumes that a person intends the ordinary consequences of his voluntary acts" violates fourteenth amendment due process because it shifts the burden of persuasion on the element of intent to the defendant. The facts were these: Defendant Sandstrom was charged with "deliberate homicide." He confessed. At trial his counsel stated to the jury that his client had killed the victim but argued that he did not do so "purposefully or knowingly"; therefore, he was guilty of a lesser crime. Two expert witnesses had testified to defendant's mental state at the time of the killing. Counsel argued to the jury that defendant's personality disorder plus alcohol consumption resulted in his not having killed the victim "purposefully and knowingly." Over objection, the trial judge gave the above-mentioned charge regarding a presumption of intent.

In *Tyler v. Phelps*, 643 F.2d 1095 (5th Cir. 1981) (on rehearing), *vacating opinion* at 622 F.2d 172 (5th Cir. 1980), the Court followed *Sandstrom* in finding a similar charge unconstitutional in a habeas corpus case. Petitioner Tyler had been convicted under a section of Louisiana's first-degree murder statute which defines as first-degree murder the killing of a human being "when the offender has a specific intent to kill or to inflict great bodily harm upon more than one person." The shooting occurred when Tyler fired a pistol from a school bus into a crowd of students who, in connection with a racial disturbance, were throwing rocks and jeering at the students on the bus. The trial court charged the jury that "the law provides that a person intends the ordinary consequences of his voluntary acts." The Fifth Circuit's opinion in *Tyler* characterizes the question of Tyler's specific intent as a "primary issue" at the trial. *See Tyler, supra*, at 1099.

There is a question as to whether the holding of *Sandstrom*, which was decided in 1979, applies to Petitioner's case since he was tried in 1974. Thus far, this question has not been resolved in this Circuit. In *Tyler*, the Court of Appeals found it unnecessary to resolve the issue because it found that the particular charge involved in the *Tyler* case was unconstitutional under another Supreme Court decision predating the *Tyler* trial, *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). Therefore, the question of whether *Sandstrom* is to be retroactive remains unresolved. This Court chooses not to rule upon this issue, since it is unnecessary for the reasons shown hereinafter.

[1] The objected-to charge is quite similar to those struck down in *Sandstrom* and *Tyler*.[10] After *Sandstrom*, the Georgia Su-

10. The Court does note that the charge is arguably internally inconsistent. It first instructs the jury that intent is presumed under certain circumstances but then goes on to say that criminal intention cannot be presumed. *But cf. Kramer v. State*, 230 Ga. 855, 199 S.E.2d 805 (1973) (upholding similar inconsistency), *overruled* on other grounds in *Hooch v. State*, 246 Ga. 417, 271 S.E.2d 817 (1980). Any ambiguity does not aid the State, however, since it cannot be said with any degree of certainty which part of the charge the jurors deemed controlling.

The Court also notes that the jury was instructed the presumption could be rebutted, an element apparently not present in *Sandstrom*. Further, the Georgia Supreme Court has ruled that charges on rebuttable presumptions in criminal cases do not shift the burden of persuasion. *See State v. Moore*, 237 Ga. 269, 270, 227 S.E.2d 241, 242 (1976); *Washington v. State*, 142 Ga.App. 651, 236 S.E.2d 837 (1977). This is consistent with Georgia's approach that factual presumptions are evidence for the jury to consider, even where evidence opposing the presumption has been adduced. *See generally*, Agnor, W. H., Agnor's Georgia Evidence, § 17-8 (1978 ed. and 1980 Supp.). However, in the Court's opinion, it would be inconsistent with the Court of Appeals' decision in *Tyler* to characterize the instant presumption other than as a burden-shifting presumption. In *Tyler*, the jury was charged that the presumption continued until it was "outweighed," otherwise the jury was bound to find in accordance with the presumption. *Tyler, supra*, at 1099. The Court found this charge shifted the burden of persuasion. Leaving aside legal niceties not apt to be appreciated by a jury, the Court sees the only difference between the *Tyler* charge and that presented here as one of degree. The *Tyler* charge emphatically directed the jury to follow the presumption unless it was outweighed by other evidence; the instant charge

preme Court specifically disapproved its further use in Georgia courts. *Hosch v. State*, 246 Ga. 417, 271 S.E.2d 817 (1980). If the language of the charge is the controlling factor here, Petitioner's attack may well be meritorious. However, the Court finds that under the somewhat unique facts presented here, the language of the charge is not the controlling consideration.

[2] In the Court's opinion, the trial strategy employed by Petitioner more radically relieved the State of its burden of persuasion than did the court's charge on the rebuttable presumption of intent. Knowing that the State's evidence was overwhelming and highly inflammatory, and taking into account the fact that the trial jury would also be the sentencing jury—Petitioner made a decision to admit guilt, and garner whatever sympathy could thereby be obtained. In his opening statement and his closing argument, Petitioner's counsel stated to the jury that his client was guilty. At one point in the closing argument, he stated that his client was "guilty of the crime of murder" although at a subsequent point the suggestion was made "maybe he's guilty of manslaughter." Viewing defense counsel's remarks most favorably to Petitioner, defense counsel was still inviting the jury to find his client guilty of voluntary manslaughter, which in Georgia includes the element of intent (though not malice aforethought) just as does first-degree murder.[11] Given Petitioner's admission, and the fact that neither counsel's argument, statements to the court nor any questions to any of the witnesses even remotely hint that Petitioner considered intent to be disputed, the Court finds that Petitioner's conduct so effectively aided the State in meeting its burden of persuasion on the issue of intent that he cannot now be heard to complain of the mildly burden-shifting effect of the charge involved here.[12] Thus, Petitioner was not prejudiced by the charge.

[3, 4] The implication of the foregoing is two-fold. First, under the precedent of this Circuit, an erroneous jury charge will support collateral attack on the state court judgment only if the charge "so infected the trial as to render it fundamentally unfair." *Tyler, supra*, at 1100. Here, for the reasons just stated, the Court finds that the charge did not render Petitioner's trial fundamentally unfair. Secondly, it is possible in limited circumstances for constitutional error to be harmless. The Court holds this is one of those instances.

stated the same thing less emphatically and with no accompanying instruction that the presumption was merely evidence for the jury to consider. Therefore, since the *Tyler* charge was held to shift the burden of persuasion, the Court concludes this one did too.

Even if it is not viewed as altering the basic allocation of the burden of persuasion, a charge flatly stating that the "law presumes" any fact is objectionable where it gives a heavy-handed assist to the party favored by the presumption in meeting its burden of persuasion. The particular presumption involved here is nothing more than a statement of what any juror would know instinctively anyway. Thus, it imparts no helpful legal principle to the jury, while lending the court's qualified endorsement to the prosecution's case on the element of intent.

11. Voluntary manslaughter is defined as follows:

A person commits voluntary manslaughter when he causes the death of another human being, under circumstances which would otherwise be murder, if he acts solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person; however, if there should have been an interval between the provocation and the killing sufficient for the voice of reason and humanity to be heard, of which the jury in all cases shall be the judge, the killing shall be attributed to deliberate revenge and be punished as murder.

Ga.Code Ann. § 26-1102 (1977 rev.).

Involuntary manslaughter is defined as follows:

(a) A person commits involuntary manslaughter in the commission of an unlawful act when he causes the death of another human being without any intention to do so, by the commission of an unlawful act other than a felony.

Ga.Code Ann. § 26-1103 (1977 rev.).

12. As noted in the statement of facts, Petitioner's counsel did ask the trial court to charge the jury on his client's right to stand silent, which the court did. However, the Court reads this as being consistent with Petitioner's strategy to make the jurors feel as sympathetic as possible toward him personally, since the same jury would be one deciding the sentence.

In *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), the Supreme Court held that before constitutional error can be held harmless, it must be shown to be harmless beyond a reasonable doubt. Here, Petitioner argues that a burden-shifting charge on an element of a crime can never be harmless error. This question was not resolved by the Supreme Court in the *Sandstrom* decision, but rather was expressly left open. *Sandstrom, supra*, 442 U.S. at 526–27, 99 S.Ct. at 2460–2461. In *Hammontree v. Phelps*, 606 F.2d 1371 (5th Cir. 1979), the Court of Appeals for the Fifth Circuit held that a burden-shifting charge required reversal of the district court's denial of the writ of habeas corpus, even though there was evidence in the record independent of the tainted presumption to sustain the conviction. The Court of Appeals held that the failure to give a proper charge was not harmless, "since the verdict might have resulted from the incorrect instruction." *Hammontree, supra*, at 1380, *quoting United Brotherhood of Carpenters & Joiners v. United States*, 330 U.S. 395, 409, 67 S.Ct. 775, 782, 91 L.Ed. 973 (1947).[13]

This Court interprets the *Hammontree* decision to mean that mere weight of the evidence with respect to an element of a crime cannot cure a facially (unconstitutionally) deficient charge on that element. Here, however, more than the weight of evidence is involved. As noted, Petitioner's own trial strategy negated the materiality of intent as an issue. The Court finds beyond a reasonable doubt that the error in the charge was harmless. This finding is based on his counsel's statements as to his guilt, together with a review of the entire trial transcript which reflects no conduct of Petitioner or his counsel inconsistent with Petitioner's admissions of guilt, and abundant evidence to support a finding of intent.

13. The Court notes headnote No. 8 stating that "[a]n unconstitutional jury instruction on an element of the crime can never constitute harmless error." *Hammontree, supra*, at 1372.

B. Admissibility of Petitioner's Confession

The Court adopts the full and accurate statement of facts pertinent to Petitioner's arrest and confession, as set forth in the Magistrate's Report and Recommendation of January 9, 1980, pp. 5–11. For convenient reference, the statement of facts is set out herein as follows.

* * * * * *

At 1:00 a. m. on January 19, 1974, Sheriff Earl Lee of Douglas County, Georgia, received a telephone call from an informant whom he had known for five years (FT–II–104, 116).[14] Lee knew that a woman's body had been found in nearby Clayton County (FT–II–131). As a result of what the informant—she has identified herself as Sandy—said to Lee on the telephone, he hurried to his office to meet her. She wanted to talk about the murder of the girl, Donna Marie Dixon. Lee taped her statement (FT–II–117–18). In the statement Sandy told Sheriff Lee what she had found out about the circumstances of the murder of the girl whose body had just been discovered in Clayton County. She was told about it by a waitress at the Aquarius Lounge. She knew her as Bonnie (FT–II–126). Bonnie had said that Wes, her live-in paramour, killed the seventeen-year-old white female because she had given some money belonging to Wes and a friend of his to her colored pimp (FT–II–126). Sandy told the Sheriff that she knew exactly where Wes and Bonnie could be found provided they were picked up before 4:00 a. m. (FT–II–127). Although she did not know where Bonnie and Wes lived, she knew that Bonnie worked at the Aquarius Lounge and that Wes hung out at Mike's, right next door to Peaches, with the Outlaw motorcycle gang (FT–II–127). All of these establishments are in the Peachtree-Tenth Street area of Atlanta, Georgia, a locale commonly referred to as "The Strip." Sandy related

This headnote, of course, is not a part of the Court of Appeals' opinion.

14. Reference is to the transcript of the hearing held by the Magistrate.

that Bonnie worked at the Aquarius only on weekends (FT–II–130). She described Wes as being from California and said that Wes and Bonnie lived in a house in Atlanta (FT–II–129, 132). Sandy had seen Wes and Bonnie together on the Thursday night that Bonnie had told Sandy of the murder. When they met, Wes at first acted as though he were afraid (FT–II–134, 137). Wes left the bar, but the conversation between Sandy and Bonnie continued.

Bonnie's story of the killing, as related to Sandy, was full of detail. In addition to providing an insight into the motive (FT–II–126), she stated that she had witnessed Wes torture, sexually assault, and beat the female and then strangle her and push her head back hard to break her neck (FT–II–127). Bonnie further told Sandy that after Wes had killed the girl, he broke both of her arms and legs so that the body could be fitted into a trunk (FT–II–136). Sandy believed Bonnie because she appeared to be scared as she told her story (FT–II–136). Sandy's brother had accompanied her to the Aquarius Lounge. At one point Bonnie asked that the brother help Wes load the body (FT–II–137). Later, Bonnie called her home and came back and told Sandy that Wes and another were taking the body out of the apartment then (FT–II–138). She added that it was supposedly being taken somewhere around the Atlanta Airport, which is partially in Clayton County (FT–II–128, 131).

Prior to furnishing this information, Sandy had provided the Sheriff with information which on more than one occasion had resulted in prosecution. In one burglary case, her information had resulted in the issuance of a search warrant which was used to recover stolen property. At other times the information was found good for leads and so forth (FT–II–141, 144).

After the debriefing of the informant was concluded, Lee contacted the Atlanta Police Department and the Clayton County Police Department and arranged a meeting in Atlanta. He came quickly to Atlanta and played the tape for the detectives in the office of Sgt. Pharr of the Atlanta Police Department (ST–B–196) [18] (FT–II–156, 163–64). After Pharr listened to Sheriff Lee's tape, he told Detective Landrum to go to the "strip" area and see what he could find out (ST–B–197). Pharr testified that he felt that the information he had was enough to ask Landrum to bring Wes in for an interview, but he said he did not feel that he had sufficient evidence for a warrant (ST–B–196–198).[1]

Det. Landrum recalled that he was called into Pharr's office at about 2:30 a. m. and told that an informant of Sheriff Lee had provided information that the homicide presently being handled by the Clayton County Police Department had occurred in the City of Atlanta. Further, he was told that according to this information, the people involved went by first names of Wes and Bonnie (ST–B–211). Landrum said he was asked to go to the "strip" to see if he could find out any further information about the case. Landrum had worked the "strip" area a lot and was familiar with two people having these first names. He had once spoken to Wes on the telephone (ST–B–212, 215).

When Landrum arrived in the "strip" area, he spoke with an informant of some one and a half year's acquaintance. The source told him that Bonnie Succaw and Wes McCorquodale had perpetrated the homicide. Further, the informant said that the murder had occurred at Bonnie's apartment on Moreland Avenue in Atlanta (ST–B–212). He added that he had seen McCorquodale on the strip that night. In about 15 or 20 minutes he located McCorquodale at Peaches Lounge and identified him for the detective.

Landrum and another officer approached McCorquodale and told him that they would like to talk to him down at the police station (ST–B–213). Landrum said that McCorquodale asked why they were interested in him and was told that it concerned the homicide. Landrum testified at the motion to suppress hearing in state court that

18. Reference is to the trial transcript.

McCorquodale then voluntarily came with the officers and that he was not handcuffed (ST–B–214). En route, McCorquodale was advised of his constitutional rights (ST–B–226). All this occurred after 2:30 a. m. (ST–B–226).

Landrum and McCorquodale arrived at the police headquarters at about 3:00 a. m. (ST–B–193). A warning and waiver of rights form was filled out. Detective Scappoticio went over it with the defendant, and it was signed by the petitioner (ST–B–187). When McCorquodale appeared before Sgt. Pharr in the detective's office, the sergeant saw what he thought were blood stains on the petitioner's clothing, and so he instructed Scappoticio to remove the clothing (ST–B–195). The police officers tried to find clothing *for* McCorquodale, but since the available garments were too small, so [sic] he was given a blanket (ST–B–188).

After Landrum arrived at the station with McCorquodale, Sgt. Pharr instructed him to go back out to the "strip" and pick up Bonnie Succaw (ST–B–216). He located Mrs. Succaw, and they returned to the police station where she gave a complete statement (ST–B–216). During this time McCorquodale was seated with Pharr and other officers in another area (ST–B–216).

At the time that McCorquodale was taken in, he had been drinking. Landrum said that petitioner had a can of beer in his hand when he first saw him (ST–B–228). He and other officers smelled the odor of alcohol on McCorquodale (ST–B–161, 204, 227). In Landrum's opinion, McCorquodale was not drunk (ST–B–228), although McCorquodale denied being entirely sober (ST–B–343). During the state motion to suppress hearing he said that he had had three or four mugs of tequila that night (ST–B–342). However, at the federal habeas hearing he testified to having four or five beers plus two beer mugs full of tequila and ice (FT–III–55).

McCorquodale admitted that he was able to walk into the police station under his own power and that he sat up by himself (ST–B–249). He said that he voluntarily removed his clothes when asked to do so and also gave the statement voluntarily (ST–B–243, 245). To Pharr he appeared cool and collected (ST–B–208).

After Succaw gave the statement, Landrum talked to McCorquodale again, and at that point, the petitioner asked to speak to the detective alone (ST–B–156, 660). When the other officers had left the room, McCorquodale told Landrum that he had killed the girl. He made this simple assertion and then went into the details of how he had killed her and generally what had transpired at the apartment (ST–B–220, 661). While McCorquodale was giving his verbal statement, there were no other distractions (ST–B–661). Then a typist was called in, and a written statement was prepared. During this time McCorquodale's conversation drifted, and he and Landrum talked about a number of things. He asked to see Bonnie, and Landrum told him that he could as soon as they got through with the preparation of the written statement (ST–B–252).[1] During the time that the written statement was being dictated, both McCorquodale and Landrum had several cups of coffee, and they played blackjack with a deck of cards that was found in the desk. Landrum said that this seemed to relax McCorquodale (ST–B–221).

A few final facts pertinent to McCorquodale's arrest and the introduction of his statement should be noted. At the federal habeas hearing before the Magistrate, Diane Alyse Singleton testified that she had been with McCorquodale at the time that Landrum took him from Peaches Lounge. She said that he was handcuffed by the officers prior to being taken from the area (FT–I–180). Also at this hearing Landrum for the first time characterized his confrontation with McCorquodale at the lounge as an arrest.

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[1] This opinion of Sgt. Pharr was elicited by defense counsel on cross-examination during the state motion to suppress hearing.

[2] McCorquodale said that he did not give any statement until he was told that he could not see Bonnie until he did.

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Magistrate's Report and Recommendation, January 9, 1980, at 6–11.

[5] Petitioner contends that his confession was wrongfully admitted at trial. He argues that his statement to the police was inadmissible because it was obtained as the direct result of an unlawful arrest and also because his statement was involuntary in light of the circumstances under which it was obtained. He alleges that his warrantless arrest was unlawful because it lacked probable cause. The record indicates that there is some uncertainty as to whether Petitioner was actually "arrested" before he was taken to the police station or whether he was taken to the police station only for questioning. However, as Petitioner points out, the Supreme Court held in *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979), that whether a formal arrest has occurred or not, the police must have "probable cause" before taking an individual involuntarily to the police station for questioning because such police conduct constitutes a "seizure" for fourth amendment purposes. This Court agrees with the Magistrate in finding that there was sufficient probable cause to justify the taking of Petitioner into custody without a warrant as allowed under *Gerstein v. Pugh*, 420 U.S. 103, 113, 95 S.Ct. 854, 862, 43 L.Ed.2d 54 (1975) and cases cited therein. The decision to take Petitioner into custody was based on information received from two police informants acting independently. The first informant who contacted the police had provided reliable information in the past and on this occasion gave specific details concerning the crime and the possible suspects to the police. The second informant, also known by the authorities and a past source of information, told the police who had committed the crime and where it had occurred, and then led them to Petitioner and identified him. Under these circumstances, the informants proved themselves credible and their information reliable as required by *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). Although the information provided by either informant alone may not have been enough to create probable cause, in conjunction with the information provided by the other informant, the total effect was sufficient to establish the required probable cause. *See United States v. Hyde*, 574 F.2d 856, 863 (5th Cir. 1978).

[6] Having determined that the seizure of Petitioner by the police was lawful, the Court must now decide whether Petitioner's confession was voluntary under the circumstances in which it was obtained. The Petitioner had been drinking immediately prior to his being taken into custody by police. Although he testified that he had four or five beers as well as two mugs of tequila and ice, there is no testimony indicating the effect of his alcoholic intake on his voluntariness. There is no indication of the length of time Petitioner had been drinking, and although he testified that he was not entirely sober, he did admit that he was able to walk into the police station under his own power and that he was able to sit up without assistance. Petitioner had been informed of his rights prior to questioning as required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and he indicated at trial that he had given his oral statement voluntarily. The police, noticing what appeared to be bloodstains on his clothing, requested that he remove his clothing and at trial Petitioner admitted that he had complied with said request voluntarily. He was given a blanket to put around himself which he kept on for at least four hours while he remained at the police station. While Petitioner was there, the police brought in his girlfriend, Bonnie Succaw, for questioning, during or after which she began to weep in his presence. During the preparation of Petitioner's written statement, he asked to see Bonnie and was told that he could not see her until preparation of his written statement was complete.

Jurek v. Estelle, 593 F.2d 672 (5th Cir.), *rev'd on other grounds on rehearing*, 623 F.2d 929 (5th Cir. 1980) (en banc), *cert. denied*, 450 U.S. 1001, 101 S.Ct. 1709, 68 L.Ed.2d 203 (1981) and *cert. denied*, 450 U.S. 1014, 101 S.Ct. 1724, 68 L.Ed.2d 214 (1981), provides the proper analysis for the "voluntariness" of Petitioner's confession in this case. In *Jurek*, the Court recognized

that all police questioning has a coercive element but that such questioning results in constitutionally involuntary answers only when the pressure on the defendant to give an answer becomes too insistent. There are two improper aspects of such pressure; it may result in unreliable answers and it may offend the principles underlying the fifth amendment's self-incrimination clause by coercing the defendant to speak against his or her will. As the Court in *Jurek* noted, an examination of these two aspects in determining voluntariness must be based on the effect of the totality of the circumstances on the defendant's will. This Court finds that the circumstances in the present case did not undermine the reliability of Petitioner's statement. Petitioner did not have any mental handicaps or lack of intelligence that would make him particularly susceptible to the influence and suggestions of others. Nor was Petitioner's drinking prior to his being seized by the police of such magnitude as to limit his thought processes while he was at the police station, as evidenced by his demeanor at the station and his ability to give a detailed description of the events surrounding the crime. The totality of the circumstances therefore did not cause Petitioner's statement to be unreliable and his confession was in fact reliable.

There remains the question of whether the confession was freely given. Petitioner argues that the circumstances surrounding his custodial interrogation overwhelmed his will and coerced him into making his confession. The Court has noted that Petitioner's mental faculties at the police station were not hindered by his consumption of alcohol during some period of time prior to his being taken into custody. His arrest or "seizure" has been found by this Court to have been lawful. The intermittent questioning of Petitioner over a period of several hours by different police officers was not excessive or abusive and does not come close to the coercive pressures found in *Reck v. Pate*, 367 U.S. 433, 81 S.Ct. 1541, 6 L.Ed.2d 948 (1961); *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964); *Jurek*, *supra*, 598 F.2d 672. In *Reck*, the 19 year old defendant was mentally retarded and confessed to participation in a murder after being held incommunicado and interrogated by groups of police officers for nearly four days while sick and faint and inadequately fed. The defendant in *Jackson* confessed at a hospital after considerable loss of blood and soon after he had been given drugs. In *Jurek*, the defendant had limited verbal intelligence, was arrested at one o'clock in the morning and taken from his home without a shirt or shoes, was kept from his family and not given an attorney for at least forty-two hours, was moved amongst three towns several times during that period, and was not brought before a magistrate until twenty-one hours after his arrest.

The additional factor in the present case of Petitioner's having to remove his outer clothing and being given only a blanket with which to cover himself for the four or five hours he was at the police station does not contribute to any potentially coercive atmosphere. Petitioner does not allege that the police requested his clothing for the purpose of making him feel vulnerable nor does he assert that the taking of his clothing caused him such discomfort that his resistance was weakened. In fact, the police had a legitimate reason for wanting his clothing, to test the apparent bloodstains, and it appears that they would have given him other clothes to wear but they had nothing that would fit him.

[7] The other circumstances raised by Petitioner do not, in conjunction with those already mentioned, create a coercive atmosphere. The failure of the police to immediately or promptly take Petitioner before a magistrate or other convenient officer for issuance of a warrant was not coercive. Ga.Code Ann. § 27-212 (1978 rev.) requires that in a case of a warrantless arrest the offender must be taken before the most convenient officer "without delay" for issuance of a warrant, but under Georgia law the fact that this statutory provision is not complied with does not of itself render an otherwise voluntary confession inadmissible. *See Blake v. State*, 109 Ga.App. 636,

137 S.E.2d 49, cert. *denied sub nom. Blake v. Georgia*, 379 U.S. 924, 85 S.Ct. 281, 13 L.Ed.2d 337 (1964). Although the Supreme Court cases cited by Petitioner do indicate that failure to take an offender arrested without a warrant before a magistrate within a reasonable amount of time after the arrest is a factor to be considered in determining voluntariness of a confession, those cases involved lengthy delays before the defendant confessed. *See Clewis v. Texas*, 386 U.S. 707, 87 S.Ct. 1338, 18 L.Ed.2d 423 (1967); *Gallegos v. Colorado*, 370 U.S. 49, 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962); *Payne v. Arkansas*, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 (1958); and *Fikes v. Alabama*, 352 U.S. 191, 77 S.Ct. 281, 1 L.Ed.2d 246 (1957). Petitioner made his statement to the police after being in custody for several hours and not half a day or longer as in the other cases. The delay in the present case was not of sufficient magnitude to weaken Petitioner's resistance. The Supreme Court of Georgia, in *McCorquodale v. State*, *supra*, noted that Petitioner waived his right to a commitment hearing in this case.

This Court also finds that the playing of cards between one of the police officers and Petitioner during the period of questioning and the intermittent questioning by a variety of police officers over several hours was not of such effect that "in weighing the totality of the circumstances," Petitioner was unable to make "an independent and informed choice of his own free will, possessing the capability to do so, his will not being overborne by the pressures and circumstances swirling around him." *Jurek v. Estelle*, 623 F.2d 929, 937, 941 & n.7 (5th Cir. 1980) (en banc), cert. *denied*, 450 U.S. 1001, 101 S.Ct. 1709, 68 L.Ed.2d 208 (1981) and cert. *denied*, 450 U.S. 1014, 101 S.Ct. 1724, 68 L.Ed.2d 214 (1981).

The Court finds further that the questioning of Bonnie Succaw in the presence of Petitioner prior to his written statement did not constitute an improper influence or a direct or implied promise that would destroy the voluntariness of Petitioner's confession. His written confession after Bonnie gave the police her statement cannot be viewed as an effort to exonerate Bonnie nor can her presence be seen as an improper inducement for his statement. Petitioner did not request to see Bonnie or talk to her until she had already arrived at the police station and he had verbally confessed. Therefore the refusal by police to allow Petitioner to talk to Bonnie until his oral statement had been put into writing had no effect on his decision to confess. This Court finds that Petitioner's statement was not only reliable but was also freely given considering the totality of the circumstances and therefore, under *Jurek*, *supra*, 623 F.2d 929, was voluntary and admissible.

II. Petitioner's Sentence

A. Propriety of Jury Selection

Petitioner attacks his death sentence by alleging that at least seventeen prospective jurors were systematically removed from his jury panel due to their conscientious views against capital punishment, such removal being in violation of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). In *Witherspoon*, the Court held "that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U.S. at 522, 88 S.Ct. at 1777. However, the Court in *Witherspoon* did note the following:

> [N]othing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*.

391 U.S. at 522 n.21, 88 S.Ct. at 1777 (emphasis in original).

The challenged portion of jury selection proceeded as follows:

(Questioning of prospective jurors by counsel for the State)

Ladies and gentlemen, I want to address to you now, three questions and if your answer to the first question is, yes, will you please stand. If your answer to this question is no, will you please remain seated.

The question is this. Are you conscientiously opposed to capital punishment? If you're conscientiously opposed to capital punishment, if you will, please stand. If you are not conscientiously opposed to capital punishment, remain seated.

All right, now all the jurors who are conscientiously opposed to capital punishment, please stand. Now ladies and gentlemen, those of you who are standing, those who are standing and who have indicated by doing so that you are conscientiously opposed to capital punishment, I'd like to address to you two additional questions. If your answer to either of these questions is, yes, I'd like to, if you would, please simply step up to the rostrum.

If your answer is no to both questions, then please remain where you are.

The first question is this. Would you allow your opinion about capital punishment to prevent you from voting for the death penalty in this case, regardless of what the evidence was?

MR. RIDLEY: I object. That's not a proper question.

MR. ENGLAND: Yes, it is a proper question, if your Honor please.

If your answer is yes to the question, please step forward to the rostrum.

Would you allow your opinion about capital punishment to prevent you from voting for the death penalty in this case regardless of the evidence?

And would the others still remain standing; those who are standing.

Let me address this last question to the other ladies and gentlemen who were standing. Everybody who was standing.

THE COURT: This is addressed to the ones who are standing, but who have not come forward?

MR. ENGLAND: This is addressed to every juror who has not come forward but who has indicated by standing, that you are conscientiously opposed to capital punishment.

The question is this. Would you allow your opinion about capital punishment to prevent you from being a fair and impartial juror on the issue of guilt or innocence as distinguished from the issue of punishment? If you would, would you please step forward.

If your Honor please, in relation to these ladies and gentlemen who have stepped forward in response to the questions, I would respectfully move to the Court that they be allowed to be excused for cause.

MR. RIDLEY: If the Court please, to which we would object to their being excused. We make the objection for each and every juror who is standing, the same objection; we would object to them being excused for cause.

THE COURT: Overrule such objection.

(Tr. 278–81).

Petitioner made no request to question the jurors before they were excused.

[8] Petitioner contends this method of identifying those jurors who will not, under any circumstances, impose the death penalty is improper. Specifically, he contends that a nonverbal mass response to questions about capital punishment does not make it "unmistakably clear" that each responding juror will automatically vote against the death penalty. Petitioner claims *Witherspoon* requires individual questioning of each juror by the court or counsel.

Assessment of Petitioner's argument, in the Court's view, primarily turns on one's assessment of human nature, including interpretation of how jurors tend to act during jury selection. In the Court's experi-

ence, the courtroom setting tends to reinforce the inclination of most people not to single themselves out in a group setting. Given this observation, the Court believes it does take some measure of conviction for a juror to stand in announcement of his conscientious objection to the death penalty, at least in those cases where the number of jurors responding (standing) is not so great in proportion to the total number present that there is tacit pressure to join the standing group. Although the transcript does not indicate the precise number of jurors who were present during jury selection, the Court deduces that it was something in excess of 60 persons (Tr. 276–446).[18] Nineteen persons rose in response to the prosecution's initial request for all opposed to capital punishment to rise. Four of these ultimately decided that they could, under some circumstances, impose the death penalty and thus they were not stricken for cause.

Taking into account the numerical ratio involved here, and the fact that the State's two follow-up questions to the standing jurors required those opposed to the death penalty to take further positive action (*i. e.* stepping forward again) to declare their opposition to the death penalty, the Court finds that the procedure is not deficient under *Witherspoon*. While it would have been error for the trial judge to refuse Petitioner the opportunity to further voir dire the standing jurors, it was not error for the court to fail to conduct an individual voir dire of the standing jurors. In summary, the Court finds that the fifteen jurors who were excused did make it "unmistakably clear" that they would vote against the death penalty no matter what the evidence showed.

[9] Petitioner further claims that two particular jurors, Miss Sylvia Woodlief and Mr. Allen Kidd, were improperly excused after individual voir dire of each of them was conducted by the prosecution. Neither of these jurors had stood earlier in response to the questions discussed above.

The colloquy with Miss Woodlief was as follows:

BY MR. ENGLAND:

Q Miss Woodlief, you say you're what?

A I'm a sales representative for Gillette.

Q The razor blade company?

A Yes.

Q Have you served before on a jury in a criminal case this week?

A This week.

Q Do you recognize anyone at the other table?

A No.

Q Would you be fair and impartial in this case, go by the evidence and the law, let your verdict speak the truth on that basis?

A Yes.

Q Do you really believe in capital punishment?

A No.

Q You don't?

A No, I don't. It's different being faced, you know, discussing capital punishment and sending someone to the electric chair.

THE COURT: You didn't understand the question that was posed to you awhile ago?

THE JUROR: Yes, I did at that time. I thought that under certain situations and possibly to rationalize this to myself, but sitting here and observing, I don't think I could do it, I really don't.

THE COURT: All right, Mr. Ridley. That's grounds for excusal for cause. You may be excused. (Tr. 400–01)

The colloquy with Mr. Kidd immediately followed that with Miss Woodlief and was as follows:

BY MR. ENGLAND:

Q Mr. Kidd, I couldn't tell where you worked.

18. These jurors were excused for bias based on prior knowledge of the facts of the case; 15 were excused for cause based on inability to impose the death penalty; 48 jurors were then individually questioned prior to selection of the jury. The record is silent as to whether additional prospective jurors, who did not participate in voir dire, were present.

A Powell View Company.

Q A nursing home?

A Yes.

Q Have you served before in a criminal case?

A No.

Q Do you recognize anybody at the other table?

A No.

Q Would you be a fair and impartial juror in this case and just let your verdict speak the truth based on the evidence that comes out in court and the law that his Honor gives you?

A Yes.

Q Do you really believe in capital punishment?

A To a certain extent.

Q To a certain extent?

A Yes, sir.

Q Do you feel there are cases where under the evidence it would be a right and just verdict?

A Well, in a way.

Q Well, when it comes down, like the last lady said, from a theoretical point to where a juror would be asked to vote, do you think you could really never vote for the death penalty no matter what the evidence was?

A No, sir.

Q You don't think you could?

MR. ENGLAND: If your Honor please, I believe it should be excused for cause.

THE COURT: You say you never could vote for it regardless of the circumstances?

THE JUROR: No, sir.

THE COURT: Did you hear the question that was posed to you just awhile ago? Did you understand the question?

THE JUROR: No, I did not understand.

THE COURT: You could not under any circumstances vote for the death penalty?

THE JUROR: No.

THE COURT: Is that right, under any circumstances?

THE JUROR: No.

THE COURT: In that case, you may be excused.

MR. RIDLEY: May the same objection be noted?

THE COURT: Yes. (Tr. 402–04)

In the Court's opinion, both of these jurors ultimately did make it unmistakably clear that they could not vote for the death penalty. Though they indicate some initial equivocation, the "bottom line" is unequivocal. Further, the Court knows from observing voir dire that the trial judge often must make judgments as to whether or not a prospective juror really means it when he says something. This Court believes some deference is due the judgment of the trial judge, who heard these two jurors as they stated that their reconsidered positions were that they could not impose the death penalty under any circumstances. Therefore, the Court rejects Petitioner's argument that Miss Woodlief and Mr. Kidd were improperly excused, as the Court does find that they made their respective positions unmistakably clear.

[10] Petitioner also claims he was entitled, under the sixth and fourteenth amendments, to select from among those prospective jurors who admittedly were unalterably opposed to the death penalty. He says his right to select from a group representing a true cross-section of the community has been abridged. This argument has been ruled upon adversely to Petitioner in *Spinkellink v. Wainwright*, 578 F.2d 582, 596 (5th Cir. 1978), *cert. denied, Spenkelink v. Wainwright*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979), and thus is rejected.

B. Discriminatory and Arbitrary Application of the Death Penalty

[11] Petitioner recognizes that in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), the Supreme Court held that the present Georgia statutory system under which Petitioner was sentenced to death is constitutional on its face. Petitioner argues instead that the Georgia death penalty statute, Ga.Code Ann. §§ 27–2503, –2534.1, is unconstitutional in its enforce-

ment because it is discriminatorily and arbitrarily applied in several ways. He contends that discrimination based upon the race of the offender and upon the race of the victim substantially influences the imposition of capital sentences in Georgia and that the arbitrary factors of race and geography play a significant role in the imposition of capital sentences in Georgia. Specifically, Petitioner asserts that there is a much greater likelihood of receiving the death penalty if the defendant is white, if the victim is white, or if the defendant is convicted and sentenced in certain regions of Georgia rather than other areas of the state.

At an evidentiary hearing held before the Magistrate, Petitioner offered certain statistical data and other evidence calculated to prove these contentions. The Magistrate ruled most of the statistical charts inadmissible but certain related oral testimony was admitted. As is more fully set forth in the Court's Order of even date herewith on Petitioner's Motion for a Further Evidentiary Hearing, the Court finds that such evidence is irrelevant to any issue before the Court, under the standards set forth in *Spinkellink, supra*. There, the Court held that where a state's sentence review system is constitutional on its face, a federal habeas court should not weigh evidence of discriminatory or arbitrary application of the death penalty, *unless* the circumstances of petitioner's case are such that petitioner is "so clearly undeserving of capital punishment that to impose it would be patently unjust and would shock the conscience . . .," or where "petitioner can show some specific act or acts evidencing intentional or purposeful racial discrimination . . ." *Id.* at 606 n.28, 614 n.40. Petitioner's case is not one where the facts show he is so clearly undeserving of capital punishment that to impose it would be patently unjust and shock the conscience. Also, as noted in the Court's Order on Petitioner's motion for a further evidentiary hearing, no inference of intentional or purposeful racial discrimination is appropriate here either on the proffered or actually admitted evidence. This is true even if Petitioner's evidence shows exactly what Petitioner claims it does, namely, gross statistical disparity between defendants receiving the death penalty where the victim is white and defendants receiving the death penalty where the victim is black. Such disparity, if it exists, indicates no form of intentional or purposeful discrimination against Petitioner.

C. Closing Argument by Prosecution

[12] Petitioner argues that a remark made by the prosecutor during the closing argument to the jury at the sentencing phase of the trial made that hearing fundamentally unfair in violation of due process. The remark in question is as follows:

> But, you have a contribution to make. A vital contribution which you are now considering and will be deliberating on. And after your decision, the Appellate Court will have a very important responsibility. (Tr. 766).

Counsel for Petitioner immediately objected to the remark concerning the Appellate Court and moved for a mistrial. The trial court denied the motion and gave the jury the following cautionary instruction:

> Now ladies and gentlemen, this portion of the argument is proper, and I quote and unquote. ["]But you have a contribution to make, a vital contribution which you are now considering and will be deliberating on.["]
>
> This portion of the argument made by the District Attorney is highly improper and I quote. ["]And after your decision the Appellate Court will have an important responsibility.["] End of quote.
>
> Now ladies and gentlemen, I urge this brief instruction, that you eliminate from your minds any consideration whatsoever respecting that particular portion of the District Attorney's argument, ladies and gentlemen. Give it no consideration whatsoever, insofar as you are concerned as jurors. This case is concluded when you return your verdict. As a matter of fact, theoretically, insofar as this court is concerned, it is concluded, ladies and gentlemen. Give that remark no consideration whatsoever. Eliminate it from your

minds as though it was never made and ladies and gentlemen, again, I would request to be very assured, to disregard what is a highly improper remark. (Tr. 770–71).

In giving this instruction the trial court recognized the impropriety of the prosecution's remark and hoped to cure any prejudice that it may have caused.

This Court must determine whether the cautionary instruction had a sufficient curative effect. In *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), the Court held that certain remarks by the prosecution during closing argument, taken in the context of the entire trial, were not sufficiently prejudicial to violate the defendant's due process rights. The decision in *Donnelly* was based primarily on the effect of the state court's instruction that the prosecutor's remark was improper and should be disregarded. With respect to the cautionary instruction in *Donnelly* the Court said:

> In addition, the trial court took special pains to correct any impression that the jury could consider the prosecutor's statements as evidence in the case. The prosecutor, as is customary, had previously told the jury that his argument was not evidence, and the trial judge specifically reemphasized that point. Then the judge directed the jury's attention to the remark particularly challenged here, declared it to be unsupported, and admonished the jury to ignore it. Although some occurrences at trial may be too clearly prejudicial for such a curative instruction to mitigate their effect, the comment in this case is hardly of such character.

416 U.S. at 644, 94 S.Ct. at 1872. The Fifth Circuit has also indicated that in determining the prejudicial effects of remarks made during summation the court must look at the context of the entire hearing in which the remarks were made. *See Croanos v. Alabama*, 587 F.2d 246 (5th Cir. 1979), *cert. denied*, 440 U.S. 974, 99 S.Ct. 1542, 59 L.Ed.2d 792; *Alvarez v. Estelle*, 531 F.2d 1319 (5th Cir. 1976), *cert. denied*, 429 U.S. 1044, 97 S.Ct. 748, 50 L.Ed.2d 757 (1977).

Within the context of the sentencing hearing in the present case, this Court finds that the trial judge's instruction was sufficient to cure or erase any harm or prejudice caused by the prosecution's remark. The improper remark in this case was "[a]nd after your decision, the Appellate Court will have a very important responsibility." The magnitude of any harm caused by such a remark pales in comparison to the improper remark which served as a ground for reversal in *Prevatte v. State*, 233 Ga. 929, 214 S.E.2d 365 (1975). In *Prevatte*, the district attorney made the following comments to the trial court in the presence of the jury:

> Your Honor, please, the other, the fifth thing is that the trial court, yourself, your Honor, you have the right even if the jury should recommend death of your own accord to reduce it to a life sentence if you saw fit. Sixth, there is now an automatic appeal which provides that the case go to the Supreme Court of Georgia, where they consider not only the evidence of guilt, but whether or not the evidence in that case warrants the death sentence, they, of their own accord from reading the record have the right and they have already done so in one particular case, to set aside the death sentence and set a life sentence for the offense of murder.

233 Ga. at 931, 214 S.E.2d at 367.

The comment in the present case was very brief and its meaning fairly ambiguous. The effect, if any, it had on the jury's view of their responsibility in sentencing was corrected by the court's instruction, which was as thorough as that given in *Donnelly, supra*. Therefore, no prejudice resulted and due process was not violated.

D. System of Appellate Review

[13] Petitioner argues that Georgia's system of appellate review in capital cases operated to deny him the effective assistance of counsel, a fundamentally fair and reliable review of his death sentence, and his right not to suffer cruel and unusual punishment. He gives the following reasons for this argument: (1) the review pro-

cedures are inadequate and unfair as shown by an analysis of the Georgia Supreme Court's performance in sentence review; (2) there is a lack of access by capital defendants to relevant sentence review materials; and (3) the public statements of the Chief Justice of the Georgia Supreme Court indicate his lack of objectivity in reviewing death sentences.

Under Ga.Code Ann. § 27-2537 (1978 rev.), there is an automatic review by the Georgia Supreme Court of sentences of death that have been imposed once the judgment has become final in the trial court. The court bases its review of death sentences upon the entire record and transcript of the trial court as well as a notice prepared by the clerk of the trial court and a report prepared by the trial judge. The sentence review process is aided by an Assistant to the Supreme Court, who is an attorney appointed pursuant to § 27-2537(f), which requires that the court

> shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

Among the determinations which the Georgia Supreme Court is required to make under § 27-2537(c) in relation to death sentences is the following:

> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Mr. Dennis York, the appointed Assistant to the Supreme Court until April 30, 1979, testified at deposition that in his role as Assistant he collected, read, and summarized the transcripts of only those capital cases which had been appealed to the Supreme Court. His testimony indicates that in making its proportionality review under § 27-2537(c)(3), the Georgia Supreme Court considered as "similar cases" only cases that had been automatically appealed as a result of death sentencing and those capital cases involving life sentences which were actually appealed. This would exclude from the pool of cases for comparison all capital cases involving life sentences which were not appealed.

What the Georgia legislature meant when it required accumulating the records of "all capital felony cases in which sentence was imposed . . ." is certainly open to interpretation.

In *Gregg v. Georgia*, *supra*, the judgment of the Court as announced by Justices Stewart, Powell and Stevens included a finding directed to the precise point raised by Petitioner, as follows:

> The petitioner claims that this procedure has resulted in an inadequate basis for measuring the proportionality of sentences. First, he notes that nonappealed capital convictions where a life sentence is imposed and cases involving homicides where a capital conviction is not obtained are not included in the group of cases which the Supreme Court of Georgia uses for comparative purposes. The Georgia court has the authority to consider such cases, [citation], and it does consider appealed murder cases where a life sentence has been imposed. We do not think that the petitioner's argument establishes that the Georgia court's review process is ineffective.

428 U.S. at 204 n.56, 96 S.Ct. at 2939.

The judgment was joined in by Justice Blackmun, who filed no separate opinion. Concurring opinions were filed by the Chief Justice, Justice White and Justice Rehnquist; the concurring opinions did not address the referenced issue.[17]

Whether or not *Gregg* decided the question at hand, the Court finds that Petitioner cannot complain of the alleged irregularity, because there were no other cases similar to Petitioner's at the time of his sentencing. In *Gregg*, *supra*, at 201, the Court noted

17. Justices Marshall and Brennan dissented.

that this Petitioner's case was the only one in which the death sentence had been upheld where the only statutory aggravating circumstance found was that described in Ga.Code Ann. § 27-2534.1(b)(7).[18] Petitioner has failed to indicate that there were nonappealed life sentence cases involving torture-murder that could have been compared to the present case by the Georgia Supreme Court.

Petitioner has presented or attempted to present statistical evidence by which he attempts to show that the Georgia Supreme Court's review process is inadequate. The Court finds that Petitioner's statistical analysis on this point is insufficient. He has analyzed the review process by isolating only two factors for comparison, whether the offense was accompanied by a felony and whether the offender had a prior record of criminal violence. The use of only two factors for comparison out of the many possible characteristics looked at by the Georgia Supreme Court does not provide for an accurate and complete analysis. Petitioner also argues that the review process was unfair because he was denied access to the case summaries used by the Georgia Supreme Court and because he was unable to obtain transcripts of all nonappealed capital cases due to his indigency. This Court finds that the cases cited by Petitioner[19] are inapplicable to the review process at issue and that these claims lack merit. The Court also finds that there is a lack of merit in any claim by Petitioner that the public statements concerning capital punishment attributable to the Chief Justice of the Georgia Supreme Court indicate that the review process was unfair or inadequate. Petitioner has failed to show that the Chief Justice's general views about the death penalty reflect personal bias in Petitioner's case or an improper method of sentence review generally.

E. Petitioner's Mental Competence

[14] Petitioner alleges that he is presently mentally incompetent to be executed under Georgia law and that a violation of due process and equal protection will result if his death sentence is carried out without a prior examination and hearing on his sanity. Sections 27-2601 to -2603 (1978 rev.) of the Georgia Code are at issue. Ga.Code Ann. § 27-2601 states "No person who has been convicted of a capital offense shall be entitled to any inquisition or trial to determine his sanity." Ga.Code Ann. § 27-2602 reads as follows:

18. In *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), the Court held that Ga.Code Ann. § 27-2534.1(b)(7) (held constitutional on its face in *Gregg, supra*) was unconstitutionally applied based on the specific facts in *Godfrey*. Section (b)(7) allows a convicted murderer to be sentenced to death if it is found beyond a reasonable doubt that the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." The defendant in *Godfrey* killed his wife and mother-in-law by shooting each one in the head with a shotgun. No violent acts were committed against either victim aside from the actual shootings. In sentencing defendant to death for each murder, the jury found "that the offense of murder was outrageously or wantonly vile, horrible and inhuman." The jury did not specifically find that the murders involved "torture, depravity of mind, or an aggravated battery." The Georgia Supreme Court affirmed the conviction and vacated the sentence in *Godfrey v. State*, 246 Ga. 359, 274 S.E.2d 329 (1980).

In *Godfrey*, the United States Supreme Court found that the jury's finding indicated that there was no restraint on the arbitrary and capricious infliction of the death sentence prohibited by *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). The Court was primarily concerned with the fact that the Georgia Supreme Court had previously affirmed sentences under § (b)(7) only when there was torture or aggravated battery involved in the form of serious physical abuse of the victim before death. In *Godfrey*, the defendant did not inflict any physical injury on the victims preceding their deaths.

The facts of the present case are very different from those in *Godfrey*, and indeed were so noted in the *Godfrey* decision itself. 446 U.S. at 429-430, 100 S.Ct. at 1765.

19. Petitioner relies primarily on *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (nondisclosure of presentence materials by trial court); *Roberts v. LaVallee*, 389 U.S. 40, 88 S.Ct. 194, 19 L.Ed.2d 41 (1967) (failure to provide free transcript of preliminary hearing to indigent); *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956) (failure to provide free trial transcript to indigent seeking direct appeal).

Upon satisfactory evidence being offered to the Governor, showing reasonable grounds to believe that a person convicted of a capital offense has become insane subsequent to his conviction, the Governor *may*, in his discretion, have said person examined by such expert physicians as the Governor may choose, the cost of said examination to be paid by the Governor out of the contingent fund. It shall be the responsibility of the Governor to cause said physicians to receive written instructions which plainly set forth the legal definitions of insanity as recognized by the laws of this State, and said physician shall, after making the necessary examination of the prisoner, report in writing to the Governor whether or not reasonable grounds exist to raise an issue that the prisoner is insane by the standards previously specified to them by the Governor. The Governor *may*, if he shall determine that the person convicted has become insane, have the power of committing him to the Milledgeville State Hospital until his sanity shall have been restored or determined by laws now in force. (emphasis added)

Ga.Code Ann. § 27–2603 states:

When any person shall, after conviction of a capital crime, become insane, and shall be so declared in accordance with the provisions of the preceding section, the convict *shall* be received into the Milledgeville State Hospital, there to be safely kept and treated as other adjudged insane persons. All the provisions of the law relating to insane persons under sentence of imprisonment in the penitentiary shall apply to the class of cases herein provided for, so far as applicable. (emphasis added)

Petitioner first argues that Georgia's failure to provide for a hearing on his post-conviction sanity violates due process. This question was addressed by the Supreme Court in *Solesbee v. Balkcom*, 339 U.S. 9, 70 S.Ct. 457, 94 L.Ed. 604 (1950), which held that the procedure embodied in Ga.Code Ann. § 27–2602 is not a denial of due process. Petitioner contends that the law concerning executive action and due process has changed substantially since *Solesbee* was decided and therefore a different result is required. This Court disagrees and finds that the analysis in the majority opinion in *Solesbee* is still persuasive.

The Court does recognize a potential problem arising from apparently contradictory language in §§ 27–2602 and 27–2603. Section 27–2602 states that the Governor "may" have the power to commit an offender he has found to be insane, which indicates discretion on the part of the Governor, whereas § 27–2603 states that a convicted offender "shall" be received into the state hospital if he or she is declared insane under § 27–2602, which suggests that commitment is mandatory rather than discretionary. No problem has arisen in this case from such a statutory inconsistency, however.

Petitioner also argues that the refusal by the state to grant him funds for a psychiatric examination violates his equal protection rights because he is being denied an opportunity for relief from his death sentence solely on the basis of his indigency. However, the Court finds that Petitioner's reliance on *Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956), and its progeny in this situation is misplaced. Petitioner has not been denied a valuable resource at trial or on appeal, nor has he been denied the basic tools of an adequate defense to the imposition of his death sentence as he alleges.

F. Electrocution as Cruel and Unusual Punishment

[15] Petitioner alleges that the method of execution in Georgia for carrying out a death sentence is electrocution and that such a form of execution inflicts unnecessary torture and torment, thereby constituting cruel and unusual punishment in violation of the eighth and fourteenth amendments. He contends that in comparison with other available methods of causing death, such as modern pharmacological techniques, electrocution is not a humane and civilized way to extinguish life. The

same argument was found to be without merit in *Spinkellink v. Wainwright*, *supra*, at 616, in which opinion the Fifth Circuit relied on *In re Kemmler*, 136 U.S. 436, 10 S.Ct. 930, 34 L.Ed. 519 (1890).

Since Petitioner's argument runs squarely afoul of the law of this Circuit, this Court must reject it.

CONCLUSION

Having examined each of Petitioner's contentions, this Court finds itself in agreement with the Magistrate's Recommendations for the reasons stated in this Order. Accordingly, the Court hereby DENIES the Petition for a Writ of Habeas Corpus.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 82-8011

TIMOTHY WESLEY McCORQUODALE,

Petitioner-Appellant,

versus

CHARLES BALKCOM, Warden, Georgia State Prison, et al.,

Respondents-Appellees.

- - - - - - - - - - - - -

Appeal from the United States District Court for the Northern District of Georgia

- - - - - - - - - - - - -

ON PETITION FOR REHEARING
(February 1, 1984)

Before GODBOLD, Chief Judge, RONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, HATCHETT, ANDERSON and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

Chilton Kravitch

UNITED STATES CIRCUIT JUDGE

83-6350

No. 83-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

TIMOTHY WESLEY McCORQUODALE,

Petitioner,

-v.-

CHARLES BALKCOM, Warden,
Georgia State Prison, et al.

Respondents.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, Timothy Wesley McCorquodale, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Mr. McCorquodale's affidavit in support of this motion is enclosed.

JOHN CHARLES BOGER
99 Hudson Street
New York, New York 10013

ATTORNEY FOR PETITIONER

No. 83-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

TIMOTHY WESLEY McCORQUODALE,

Petitioner,

-v-

CHARLES BALKCOM, Warden,
Georgia State Prison, et. al.,

Respondent.

AFFIDAVIT OF POVERTY

I, TIMOTHY WESLEY McCORQUODALE, declare that I am the Petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceedings or to give security therefor, and that I believe that I am entitled to relief.

1. Are you employed? Yes ____ No ✓

   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer. _____

   b. If the answer is "no," state the date of last employment, and the amount of salary and wages per month which you received. December 1973 $3.35 per hour

2. Have you received within the last twelve months any money from the following sources?

   a. Business, profession or form of self-employment? Yes ___ No ✓
   b. Rent payments, interest, or dividends? Yes ___ No ✓
   c. Pensions, annuities, or life insurance payments? Yes ___ No ✓
   d. Gifts or inheritances? Yes ___ No ✓
   e. Any other sources? Yes ✓ No ___

3. Do you own any cash, or do you have any money in any checking or savings account?

Yes ✓ No ___ (Include any funds in prison account). If the answer is "yes," state the total value of the items owned. $19.05

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?
Yes ___ No ✓

If the answer is "yes," describe the property and state its approximate value. ___

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute to their support.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Timothy W McConquodale

TIMOTHY WESLEY McCONQUODALE

Sworn to and subscribed, this

the 28th day of February, 1984.

Notary Public

My Commission expires:

Notary Public, Georgia, State at Large
My Commission Expires June 9, 1986

CERTIFICATE

I hereby certify that Petitioner, TIMOTHY WESLEY McCORQUODALE, #69924, has the sum of $ 19.05 on account to his credit at the Georgia Diagnostic and Classification Center where he is confined. I further certify that Petitioner likewise has the following securities to his credit according to the records of said Georgia Diagnostic and Classification Center.

None

David Cawthon, Sales Mgr. II
Authorized Officer of Institution 2/23/84